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Supreme Court of the United States

OCTOBER TERM, 1924
No. 551

**CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION,
THE ATLAS PORTLAND CEMENT COMPANY, THE
ALLENTOWN PORTLAND CEMENT COMPANY, et al.**

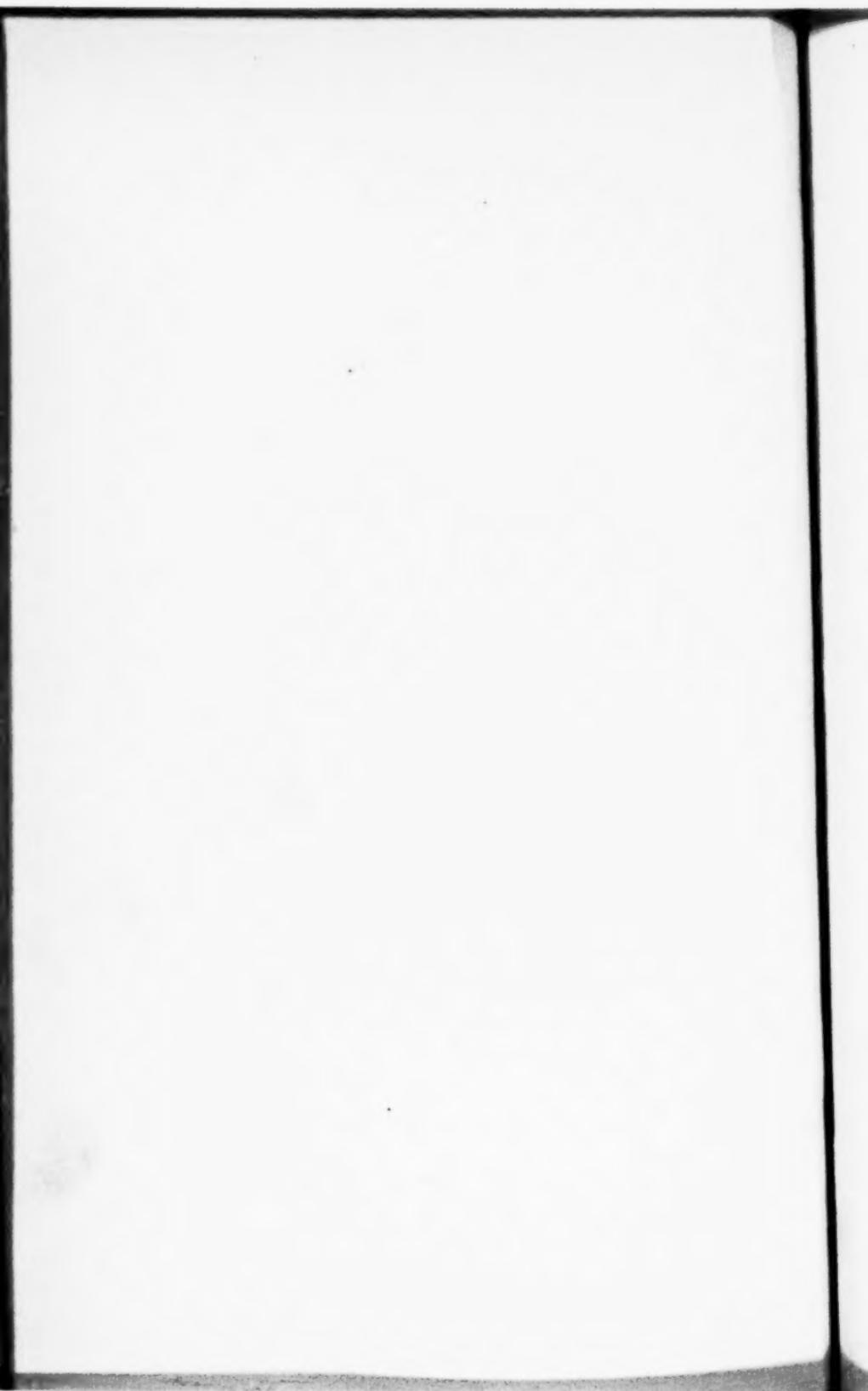
Appellants.

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THE UNITED STATES OF AMERICA

BRIEF AND ARGUMENT FOR APPELLANTS.

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ATLAS PORTLAND CEMENT COMPANY, THE ALLENTOWN
PORTLAND CEMENT COMPANY, *et al.*,**

Appellants,

vs.

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT FOR APPELLANTS.

This is an appeal under § 2, c. 544, of the Act of February 11, 1903, 32 Stat. 823, from a final decree (*R., p. 1809*) entered by direction of Knox, D. J., in the District Court for the Southern District of New York, granting a perpetual injunction in a proceeding brought by the United States under § 4, c. 647, of the Act of July 2, 1890, 26 Stat. 209, "An Act to protect trade and commerce against unlawful restraints and monopolies", against Cement Manufacturers Protective Association (an unincorporated organization), four individuals (the officers thereof); and nineteen corporations engaged in manufacturing Portland cement in Pennsylvania, New Jersey, New York, Maryland and Virginia, the members of the Association.

The petition alleged restraint of trade in violation of § 1 of the Act, "entered into and carried out through the instrumentalities of organizations known as associa-

tions" (*R.*, p. 4), which were charged with "the exchange between members of comprehensive statistical data which enables each to know what his competitors are doing and to conduct his business accordingly" (*R.*, p. 5); and prayed that the Cement Manufacturers Protective Association might be adjudged a violation of §1 of the Act and enjoined accordingly (*R.*, p. 19).

The defendants filed their joint and several answers explaining all the matters mentioned in the petition and correcting its allegations generally and in full detail (*R.*, p. 20, *et seq.*).

By stipulation (*R.*, p. 144), the case was heard, February 13-16, 1923, upon the record made at the trial of a criminal action against these corporate defendants and forty-four individuals, officers of the corporations (*United States of America vs. The Atlas Portland Cement Company, et al.*) in the United States District Court for the Southern District of New York, before Judge Knox and a jury, April 4 to May 26, 1922.

That trial had resulted in a disagreement of the jury. The Government's motion to advance says that the decision herein will largely control the further action by the Government in that criminal case and in like cases pending against a large number of cement manufacturing corporations and individuals in the Northern District of Illinois.

After final hearing on the record of the criminal trial, Judge Knox handed down an opinion on October 23, 1923, concluding that the Government was entitled to "the decree for which it asks" (*R.*, pp. 1798-1809), and entered the decree (*R.*, pp. 1809-13), thereafter modified in one particular (*R.*, p. 1813), from which this appeal has been taken (*R.*, p. 1814).

Nature of Questions Presented.

The Government's motion to advance says that the "decision by this Court upon this appeal is of public importance—

(1) Because this case involves to a greater extent than any case thus far submitted to this Court the legality of the collection, compilation, and dissemination of comprehensive statistical data through the instrumentality of a so-called reciprocal trade association.

(2) Because hundreds of corporations engaged in other lines of industry belong to Associations which have been and are collecting, compiling, and disseminating statistical data similar to those prohibited by the final decree in this case."

The case differs from "any case thus far submitted to this Court", not in the greater comprehensiveness of the statistical data or information here made available, but in its narrow limits, purposes and results.

The defendants here, in good faith and since 1916, before the legality of association activities was legally questioned, have sought and brought together for protective purposes distinct from possible restraint, only certain limited facts concerning (1) credits, (2) a particular class of closed contracts for future delivery (disclosing nothing whatever concerning 70 per cent of their sales), (3) certain statistics limited to the existing supply, and (4) the freight rates necessarily in daily use.

They have done this on the straightforward agreement that each is free to conduct his business exactly as

he pleases. There is no showing whatever of any ulterior understanding to the contrary.

The record discloses none of those injurious consequences or incriminating incidents which have brought the activities of other associations into condemnation, and contains full proof of undiminished and acute competition in the trade throughout the life of the defendant organization.

The Decree.

The decree (*R., p. 1809-1813*) in general substance:—

- (i) Enjoins the continuance of Cement Manufacturers Protective Association or any part thereof and forbids any similar organization (*R., p. 1809, Pars. 1, 2, 3*).
- (ii) Enjoins the defendants from collecting or distributing information concerning closed “specific job contracts”, either the particular information theretofore exchanged or any “information with reference to such contracts” (*R., p. 1809, Par. 4, Par. 5, last clause*).
- (iii) Enjoins the defendants with respect to statistical information, forever forbidding them from making or receiving, through any collective agency, any report of either available supply or shipment (*R., p. 1811, Par. 6*). This provision was relaxed by subsequent order to the extent of permitting reports of shipments for assessment of expenses of the national Portland Cement Association, provided the shipments are reported “at the close of the calendar year * * * and for no other purpose” (*R., p. 1813*).
- (iv) Enjoins the defendants forever from “agreeing” or “hereafter agreeing” concerning many things, chiefly established practices and customs prevailing in the industry (*R., p. 1811-12, Pars. 7, 8, 9, 10, 11*). For brevity, these items are not here particularized. They will be dealt with together when we come to point out that it was

not shown that any agreement concerning any of them existed or was contemplated.

The exact nature of the decree, trade expressions used therein, and the questions here presented, may be best explained by defining the activities of Cement Manufacturers Protective Association, leaving disputed matters for later consideration:—

The Activities of Cement Manufacturers Protective Association

The Association was formally organized in January, 1916, following some similar unorganized efforts of the manufacturers, during the three months preceding, to protect themselves along the lines of the "specific job contract" activities (*Ex. No. 530, R., pp. 715-6; Ex. 532, R., pp. 717-8*). The constitution then adopted, within which it thereafter acted, stated the objects as follows:—

"The objects of the Association are the collection and dissemination of such accurate information as may serve to protect each manufacturer against misrepresentation, deception and imposition, and enable him to conduct his business exactly as he pleases in every respect and particular, free from misdirection by false or insufficient information concerning the matters following, to wit,—

- (a) Information concerning credits.
- (b) Information concerning contracts which have been made for the delivery of cement, sufficiently complete to enable the manufacturer to protect himself against spurious contracts and like transactions induced by misrepresentation.
- (c) Information concerning freight rates on cement.
- (d) Statistical information as to production, stocks of cement and clinker on hand, and shipments" (*Ex. 13, R., p. 353*).

The constitution further provided that—

"Membership in the Association shall be recognized as implying that the member is absolutely

free to conduct his business exactly as he pleases in every respect and particular" (*R.*, p. 357).

Pursuant to a provision of the constitution (*R.*, p. 357), a public stenographer (*R.*, p. 153) reported all meetings in "minutes which contained literally every word that anyone said at the meetings taken down verbatim whether important or trivial or what not" and the minutes of all the meetings were sent to the Federal Trade Commission (*R.*, p. 162). The meetings were also attended by counsel, to whom were referred all questions concerning whether any proposed discussion or action was within the limits of the constitution and legal propriety (*R.*, pp. 401, 407, 429-30, 457-8, 462, 476, 567, 568, 570, 576-7, 580, 622-5).

The information (within definite limits hereinafter defined) was sent to the Association's office and out from it by means of printed forms because that economized work and obviated comment.*

The Association was "in substance simply a mechanical multiplying and tabulating machine" (*R.*, p. 162). It merely put together and sent out the information without comment, conclusion or suggestion (*R.*, p. 162).

The officials of the Association were a president, who presided at meetings, and a treasurer, who had custody of the funds, each connected with a corporate defendant

* The opinion below speaks of "an elaborate system of about forty forms" (*R.*, p. 1800). In fact, there were all told thirty-one forms, six connected with the information concerning credits, fourteen with that concerning specific job contracts, nine with statistics and two with a bag report (*R.*, p. 130 *et seq.*, p. 163, p. 166). But the number of forms does not indicate the subject matter and was occasioned by providing one for each stage of each detail of the business from members to the Association, the Association to its employees, the employees to the Association and the Association to members.

and serving without compensation; a secretary, (Miss Phalen, named as defendant), who had charge of the reporting (*R.*, p. 129, p. 153), and a vice-president (Major Hulsart, named as defendant), an engineer, whose duties related particularly to the technical work connected with the investigation of the amount of cement which would be required to complete "specific job contracts" (*R.*, p. 350)—paid employees without experience or qualifications enabling them to direct or shape policies for the industry and merely performing ministerially the duties assigned them by the Association. Unlike other associations which have been before the Court, there was here no one who in any degree ever expressed the collective will or served as a "common guide" (*American Column Co. v. United States*, 257 U. S. 377, 410).

The kinds of information mentioned in the constitution, represented distinct and separate services. The activities did not, and could not, interact to produce a common result. Two of the defendants, the Glens Falls and Security Companies, did not have anything to do with the contract service (*R.*, p. 162). One cement manufacturer in the territory, not defendant, the Helderberg Company, has received the credit service. The freight rate books "went broadcast almost" and to companies, such as the Tidewater Company, not connected with the Association (*R.*, p. 162). Some of the four activities were—perhaps each was—too unimportant to be conducted alone, because not worth the expense of maintaining the necessary machinery. But except in sharing the expense, each activity was a distinct and separate service.

The extent and limits of these activities, respectively, were:—

(a) The Activity Concerning Credits.

The information concerning credits was limited to a monthly alphabetical list of accounts two months or more over due, consisting of the name and address of the delinquent debtor, the amount of the over-due account and ledger balance, bills receivable, accounts in the hands of attorney for collection, and any explanation, as that the account is treated by the debtor as offset by a balance due for bags, or disputed, or the like (*R.*, pp. 159-60, *Ex. Nos. 59, 60, 61, R.*, pp. 367, 368); a comparison of the general totals with those for the past twelve months (*Ex. No. 62, R.*, p. 369); an immediate notification of payment of an account placed in the hands of an attorney (*Ex. No. 63, R.*, p. 370); and a form, "very little used", for answering inquiries as to whether a particular name had appeared in the monthly report, and, if so, where (*R.*, pp. 160-1, *Ex. No. 64, R.*, p. 370).

This is merely what is called "protective" as distinguished from "informative" credit reporting (*R.*, p. 575). There was never any comment concerning any name on the list. No agreement or understanding as to whether the delinquents should be extended more credit or the like, is either pleaded or suggested.

The activity concerning credits may be enjoined by the general injunction against the Association and all its parts (*R.*, p. 1809, par. 3). It is not touched by the specific definition of proper and improper credit activities attempted in the decree (*R.*, p. 1811, par. 8)—not by the attempted definition of proper activities because information only "upon specific requests" would be too slow for practical use in this highly competitive business; and not by the attempted definition of impropriety because

no agreement to refuse sales or credit to delinquents was ever made or contemplated.

(b) The Activity Concerning Contracts.

The activity concerning contracts or sales was limited as follows:

(1.) The Association did not collect or distribute any information whatsoever concerning the sale of 70 per cent. or more of the cement sold by its members. Nothing was disclosed concerning any sale except those made under a particular kind of contract for future delivery, always customary in this industry, known as a "specific job contract" (*R.*, p. 162).

The "Specific Job Contract" Mentioned in the Decree.

Specific job contracts have been commonly used in this industry since long before any collective activity (*infra*, p. 73).

Cement is used in large works long in construction. Those about to undertake them want an extraordinary supply of cement only for that particular work and to be sure of its cost. Manufacturers contract to supply the cement for a named price, although the costs of making cement and market conditions at the time of delivery cannot be known at the time the contract is made. Neither party wants to contract for the future delivery of that supply of cement except for that specific purpose and the common contract provides accordingly.

In the words of the opinion below, "these are agreements whereby a manufacturer is to deliver in the future cement to be used in a specific work, such as a particular building or road, and the obligation is that the manu-

facturer shall furnish, and the contractor shall take, only such cement as is required for or used for the specific purpose" (*R.*, p. 1801), called the "specific job".

Such specific job contracts in this industry have been in effect free options customarily made and treated on the understanding that the purchaser (*i*) pays nothing except after the delivery of the cement to him, (*ii*) need not take the cement, and, as an inevitable corollary, (*iii*) is not held to the price named in the contract, but, if the market goes down, gets the benefit of the reduced price, whereas the manufacturer, if the market price advances, is held to the contract price (*infra*, pp. 72-3).

The "Duplicate Contracts" Mentioned in the Decree.

Many specific job contracts, purporting to call for millions of barrels of cement in the aggregate (*R.*, p. 165), are what are known in the industry as "duplications", that is contracts which cannot be performed because they are to supply the same cement requirements of the same specific job being supplied under another contract (*R.*, pp. 163-4).

Duplications result from (*a*) contractors (or much more often dealers hoping to supply them) about to bid for the construction work, making specific job contracts with cement manufacturers to cover themselves at the time of putting in their bids and only one of them getting the construction contract, with the result that other cement contracts are left as duplications, or (*b*) by the purchaser entering into specific job contracts with several manufacturers for the same cement, without any manufacturer knowing of the duplicate contracts with the others, as, for instance, the Government witness Nawn

contracting with the Atlas Company for 150,000 barrels to be used in building a certain dam and never ordering out a barrel because he was "being supplied all right" without calling on the Atlas (*R.*, p. 218).

Many specific job contracts are not performable and call for no cement because the projected work is given up after the contract is made (*R.*, pp. 164-5).

Practically all specific job contracts largely overestimate the amount of cement that will be required to complete the job, and so on their face seem to call for much more cement than they cover, because the purchasers always "play it safe and estimate high" (*R.*, p. 231). This surplus not covered by the contract, amounting in the aggregate to several millions of barrels a year (*R.*, pp. 165-6) is known in the industry as "padding".

The "Diversion" or "Misuse" of Cement Mentioned in the Decree.

As a result of this common "duplication" and "padding" of specific job contracts, the manufacturer did not in fact know, and could not alone learn in advance, his own obligations for future delivery of cement or the extent thereof (*R.*, p. 333).

As a result of that ignorance, any unscrupulous dealer was enabled, if and when market prices had advanced, to obtain shipments of cement at the past lower prices of any specific job contract he happened to have, by sending orders falsely representing that the cement was required for use in a specific job and so covered by a specific job contract, and then resell it at a profit. Such transactions were commonly known in the industry as "diversion" or "misuse", because the cement was obtained from the

manufacturer at the price only by the false representation that it was to be used in the specific job covered by the contract and then diverted to resale.

In one illustrative instance, one manufacturer was defrauded of \$1800 by the "diversion" of only 2500 barrels of cement, accomplished by ordering out the cement under a specific job contract although the job was not to be constructed, after costs and prices had advanced seventy-five cents a barrel (*R.*, p. 165, *D-6*, *R.*, p. 1043-5, *Ex. 675*, *R.*, p. 963). The time for delivery under such contracts commonly extends over many months, and sometimes several years (*Ex. 26*, *R.*, p. 365). They purport to cover many millions of barrels in the aggregate, only a fraction of which will ever be called for or represents actual obligation (*R.*, p. 3689).

Specific job contracts have always been the common form of selling for future delivery in this industry. But, as in most matters of customary practice, their use is usual and not rigidly exclusive; and the defendant companies at times deal with futures in various other ways not involved in this case (*R.*, p. 319).

In the year 1919, 16 per cent. of the cement sold by the defendants was sold under specific job contracts; in 1920, 25 per cent.; in the other years, 30 per cent.* (*R.*, p. 162). The Association did not collect or distribute any information whatsoever concerning the rest of the manufacturers' sales (*R.*, p. 162).

* From these figures, the opinion below draws the inference "that more and more of the commodity is annually being sold under these contracts" (*R.*, p. 1801). That would emphasize the fact that the activities of the Protective Association have not tended to diminish the number of such contracts (*infra*, p. 96). But the explanation of the figures is simply the curtailment of large construction work (the field of specific job contracts) incident to the war and the gradual recovery to normal conditions.

(2) The information concerning specific job contracts was limited to such contracts as had been closed (*R.*, p. 163). The facts reached the Association's office an average of eight and one-half days after the closing of the contract and were mailed out therefrom the following day (*R.*, p. 351, *p.* 163).

(3) The contracts themselves were not sent in or opened for examination. There was no disclosure whatever of any information concerning terms or conditions, or any special arrangements or agreements between the parties to the contract, or charges or credits for bags, or discounts, or rebates, or concerning anything else except certain facts sent in by the manufacturer and learned by sending engineers to the construction work or "specific job", as follows:—

The Facts Concerning Specific Job Contracts Reported by the Manufacturer.

The facts, sent by the manufacturer on two cards, were these:—

(i) One card gave the contract number, the date, the name and address of the purchaser, a description of the job so complete that it could be identified, the name of the contractor, the number of barrels named, the price, the delivery point, and the date when the contract expired (*R.*, p. 163, *Ex. No. 14*, *R.*, p. 360).

(ii) Another card was sent in by the manufacturer showing any changes in those same facts, as that a particular contract had been completed, cancelled, decreased or increased in amount or extended—information incident to the other, because it might get rid of a dupli-

tion, head off an investigation and change statistics of commitment (*R.*, p. 163, *Ex. No. 15.*, *R.*, p. 360).

The Association listed these statements received each day and sent them to the members without comment. Once a month or once in three months a printed list was made up showing the same facts from the specific job contracts then in effect, for more convenient reference (*Ex. No. 16, 26, R.*, p. 360, side folio p. 654, 665).

This reporting of these facts concerning specific job contracts enabled a manufacturer to know, or suspect, which of his own contracts were duplications and which were obligations (*R.*, p. 333). But in some cases it merely informed him that one or more contracts existed for the same job, without determining under which the cement would be required by the builder, and it did not inform him as to how much of his apparent obligations for future delivery consisted of "padding" which would not be required (*R.*, p. 163).

The Association's Investigation of Cement Requirements of the Specific Job—the "Checkers or Inspectors" Mentioned in the Decree.

In the Fall of 1917 (after previously employing a well-known commercial agency to do the work (*R.*, p. 519), the Association took up investigating "specific jobs", to determine how much and what cement would be required by the builder, as follows:—

Any member might send to the Association a request that it investigate a particular specific job (*Ex. No. 18, R.*, p. 361). The Association employed trained engineers, who upon such requests (or when enough relating to a particular locality had collected) visited the places where

the works were in course of construction, or to be constructed, and ascertained whose cement the builder would use in each work and how much cement would be required. This information, and no other information whatever, was then transmitted to only the member or members whose cement was involved (*R.*, pp. 163-166).

These engineers (who because they checked the amount of cement which would be needed to complete the work with the estimate in the contract, were sometimes called "checkers") investigated and reported only the facts out in the field relating to the cement used and to be used in the specific work. They had nothing to do with any investigation whatever of any papers or books, or acts of the manufacturer, or anything else (*R.*, pp. 164-5).

The instructions under which they acted were in the form of a booklet (*D-4, R.*, p. 1037-8). The information to be obtained was indicated by questions on the printed form given the auditor or "checker"—whether the contract for the construction work had been awarded to the contractor, whether the work had been started, how much cement the contractor said he would use, the auditor's estimate, etc. (*R.*, p. 1032, 1036).

On these facts being transmitted to the members whose brands were involved, the activity of the Association was at an end. It did not send them to the other members. It did not advise or decide anything. It simply sent the facts, so far as they could be ascertained, to the manufacturer who could not judge the extent of his own obligations without those facts (*R.*, pp. 166-7, p. 333).

From the facts concerning specific job contracts sent in by the manufacturers, the office of the Association made up statistics of commitments or amounts under

contract, the place of which is indicated in connection with the statistical activity (*infra*, p. 20). It similarly made some statistics of merely passing interest, such as how much of the cement covered by specific job contracts was for each kind of construction work, such as bridges, roads, dams and water power, etc., but these tabulations added nothing to the information in the report of the contracts sent the members (*R.*, p. 166).

The decree restrains the defendants from having any of the particular information just described (*R.*, p. 1809-10, *par.* 4), and also any information with reference to such contracts (*R.*, p. 1810-11, *par.* 5, *last clause*). The prohibition against agreeing to cancel duplicate contracts (*R.*, p. 1810, *par.* 5, *last clause*) does not apply to this activity, because there was never agreement as to what action any member should take on the information. Even the opinion below finds that there was no such agreement as is enjoined (*R.*, pp. 1805-6, *infra*, pp. 96-7).

(c) The Activity concerning Freight Rates.

The activity concerning freight rates consisted of printing and distributing books showing in the most convenient form the freight rates—compiled from the voluminous complicated official tariffs and translated from the rate per ton of the tariffs into the rate per barrel of 380 pounds, the cement unit—to practically all points of delivery in the northeastern section of the United States, from every point where cement is produced, used by anyone as a basing point (*R.*, p. 166).

Similar lists of freight rates, substantially or exactly the same in form and contents as these books, have been

prepared and used by the individual manufacturers as a practical necessity in this particular business since before any collective activity (*infra*, pp. 63-4). The publication of the Association simply took the place of previous separate publication by individual manufacturers—with great saving of money and increased accuracy resulting from more thorough and continuous checking of the rates, but no other change.

The points of large production or basing points included in the books, were not selected by the Association. They were the same as those appearing in the prior books published by individuals—all the points ever used by anyone as basing points. They were all points of actual shipment and all the points of actual shipment of economic importance—the points from which upwards of ninety per cent. of the cement is actually shipped (*infra*, pp. 64-71).

This activity may be enjoined under the general injunction against the Association and its parts (*R.*, p. 1809, *par.* 3), but it is, we understand, affirmatively approved and not prohibited by the definitions of the decree relating specifically to freight rates (*R.*, p. 1811, *par.* 7), because there is here no “arbitrarily established basing point” and “all rates furnished” are “the actual rates between actual points of shipment and delivery” (*R.*, p. 1811, *par.* 7).

(d) The Statistical Activity.

The statistical activity was characterized by two limitations:

- (i) The information was limited to the existing supplies of cement, and

(ii) There was a complete absence of any interpretation of, or comment of any kind on, the facts and figures in any report, meeting or otherwise.

The statistical information came from two sources:—

(i) Each member sent to the Association monthly a statement of its production of clinker (*i. e.* cement just before the final grinding to powder) and ground cement, shipments and stock on hand for the past month, since the first of the year and for the corresponding periods of the previous year. These were compiled and distributed to the members without any change or comment (*R.*, p. 166, *Ex. 30-56*, *R.*, p. 366, *et seq.*). In addition to the monthly statements, semi-monthly statements of shipments alone were received and distributed (*Ex. 57, 58*, *R.*, p. 367).

(ii) From the specific job contract reports were compiled statements sent to the members, keeping them informed as to the amount of cement under specific job contracts (*Ex. 405-428*, *R.*, p. 706).

Each member of the Association was thus given full information as to the supply of cement in sight and where it was, by the figures of production, shipment, stock on hand and commitments under specific job contracts.

There was never any comment on the figures, or the market or the like. There was no statistics, estimate, prophecy or mention of actual or prospective demand (*R.*, p. 166). There was nothing which could indicate the collective will as to a future course (*R.*, p. 162).

The decree forbids the defendants from ever collecting and disseminating through any collective agency

any report of only production, shipment and stock or shipment alone (*R.*, p. 1811, p. 6). This is presumably the principal question of public interest. Whatever its legal aspects, it seems unmistakably plain that if this decree represents the law, American industry is condemned to complete ignorance of facts essential to efficiency except as some of the necessary knowledge may be collected by, and released from the custody of, some development of bureaucracy.

The Report Concerning Bags.

The only additional activity of the Association was in bringing together certain limited information concerning returned bags (which are the usual containers and constitute an instrument of delivery taken back at the price paid) decided upon some time after the organization of the Association. This was limited to sending quarterly two items (*i*) the total number of bags returned to each member during the preceding quarter and (*ii*) the percentage thereof found unfit for use (*Gov. Ex. 65-6, R.*, p. 371). The report showed that the losses always varied from about three-fourths of one per cent. by one manufacturer to about four and one-half per cent. by some other, and the diversity continued throughout.

Once in 1918 a questionnaire was sent out inquiring as to the practice of each company, to determine whether better results were obtained by cleaning before or after counting, which showed that some companies counted before cleaning, some counted after cleaning and some both before and after (*Ex. 206, R.*, p. 640).

There was no information concerning the charge and allowance, or deposit, for bags; or concerning the num-

ber returned by any particular customer or portion thereof found unfit for re-use (*R.*, p. 166).

Meetings.

The organization of the Association avoided any Board of Directors or Trustees and provided for the conduct of business along the lines of a town meeting.

The meetings were not in general attended by the officers of the companies, who determine prices, production and policies, but by their credit men and sales managers (*R.*, p. 162). The number of companies represented at the meetings varied from eleven to seventeen, with an average attendance of about two-thirds.

Monthly meetings were contemplated, but after the forms had been developed, meetings were from time to time omitted. During the only time of rising markets since the relinquishment of Government war control, the busy spring and summer of 1920, no meetings at all were held in June, July and August, with very short meetings in May and September (*R.*, pp. 605, 608). The later minutes contain many complaints that it is impossible to get attendance and suggestions which were rejected of activities designed to make the meetings more interesting and attractive (*R.*, pp. 547, 549, 620).

The meetings (reflected in the record by an inevitable concentration of only the fragments most susceptible of misinterpretation) were devoted to transacting the business of the Association, the number and salaries of employees, the publication of the reports, the rental of offices, purchasing equipment, financing the Association, considering and rejecting proposed changes in, or additions to, the activities, and the like.

The minutes show that there was nothing constrained or artificial in the conduct of the meetings, and those present were proceeding in good faith to carry on the activities of the Association within the limits of the constitution and by-laws.

There were from time to time individuals who expressed themselves at greater or less length concerning the general aspects of unimportant matters (never as to production or prices or market conditions or the like), on which there was either no action or action of the meeting against the suggestions.

There was never any mention of the figures in the statistical reports. There was no comment whatever on past conditions or on prospects as to market, production, prices, or anything of the kind. In brief, the meetings developed nothing which could supply to the manufacturer any substitute for his own independent will and judgment concerning production or prices or anything which affects the public.

The Absence of the Evidences and Instruments of Restraint Found in Other Associations.

The character of the Association is made plainer by comparing it with other Associations coming before this Court long after these defendants had determined the limits of their activities.

There was a complete absence of any of those activities of other Associations that have been examined by this Court, upon which the Court has based its findings of violations of the statute:—

- (1.) There was here no disclosure of what the Court referred to in the Hardwood case as "the minutest de-

tails of their business" (*257 U. S. 410*), and in the Linseed Oil case "all the intimate details of their affairs" (*262 U. S. 389*)—in the Hardwood case, a report of all sales with "all special agreements of every kind, verbal or written, with respect thereto" (*257 U. S. 394-5*), and in the Linseed Oil case "full, accurate, complete and certified reports of all sales, quotations and offerings" (*262 U. S. 381*). In those cases every detail of each transaction with each purchaser was fully disclosed.

In the case at bar, there was no disclosure of anything whatever concerning upwards of seventy per cent. of the manufacturer's sales; and in connection with the remaining fraction, sales by specific job contracts, there was no disclosure of the whole transaction or any special agreements, terms, conditions, discounts, commissions, rebates, etc., but merely certain facts serving definite protective purposes.

Any defendant could sell any amount of cement at any price, with any charge or allowance for bags, any discounts, any commissions, rebates, special arrangements with the purchaser, etc.,—all without any disclosure whatever. He could sell for future delivery without expecting to report except when the sale was under a specific job contract, and even the reporting of the facts concerning such contracts, could be readily omitted without possibility of detection through the Association (*R.*, p. 338).

(2.) There was here nothing in the nature of any audit or investigation of a manufacturer's books or business. In the earlier cases the members of the Association submitted their books and papers to investigation by auditors (*257 U. S. 410*; *262 U. S. 381*).

That, especially when coupled with the complete disclosure of every detail of each transaction, seems an earmark of any agreement where the sanction is "the restraint of exposure of what would be deemed bad faith" (257 U. S. 410). Its absence seems to reduce any price agreement to a silly method of inviting some among one's competitors to cut prices without fear of breaking the market.

(3.) There was here no information concerning any outstanding quotation or price. In the Hardwood case, all prices were reported "as soon as made", and the Court distinguished them from "past transactions" (257 U. S. 398). The declared object was, "by making prices known to each other they will gradually tend toward a standard in harmony with market conditions" (257 U. S. 393). In the Linseed Oil case, this was carried to the extent of an agreement not to change outstanding prices without telegraphing to the Bureau (262 U. S. 386). Particularly when accompanied by collective discussions, such outstanding prices may embody ideas very different from those upon which these defendants have proceeded (*R.*, p. 354, (2) p. 354, *infra*, p. 58, pp. 93-94).

(4.) There was here no disclosure of even past prices of seventy per cent. of the business (*R.*, p. 166).

(5.) There was here no disclosure of any charge or allowance, or deposit, for bags (*R.*, p. 163).

(6.) There was here no disclosure of any following of, or departure from the customary trade practices, except in so far as the reporting of facts from specific job contracts would indicate that people were making that

kind of contracts, as had always been customary (*R.*, pp. 153-167).

(7.) There was here no reporting of discount (*R.*, p. 163).

(8.) There was here no reporting of any cost figure.

(9.) Perhaps most important, there was here no attempt to formulate, and nothing whatever which could possibly indicate or suggest, the collective will concerning price or production or anything affecting the public interest:—

(i) There was no comment, in any report or meeting, on past business;

(ii) There was no mention, in any report or meeting, of market conditions or prospects or anything of the kind; and

(iii) There was no mention, suggestion or indication, in any report or meeting, of future production, sales or prices or of any estimate or standard therefor, or of desirable behavior with respect thereto, to which the individual manufacturer could, either specifically or generally, conform his acts.

The defendants here did not desire, or provide for, any formulation or expression of the collective will concerning price or production or other matter which might interfere with one taking advantage of his opportunities and judgment to make his own investment more secure and profitable at the expense of his rivals; and any collective standard for their conduct in such matters was as completely foreign to their thoughts, words and acts as a collective standard for their religions or polities (*infra*, pp. 120-126, 127, 128).

In the other cases before this Court, the collective will was constantly expressed through the representative or agency of all, employed largely for that purpose. In the Hardwood case, it was said "all the activities of the plan plainly culminated in the counsels contained in these letters and reports" of the "common guide" (257 U. S. 399). In the Linseed Oil case, "the bureau displayed great industry in making inquiries, collecting information, investigating the smallest derelictions and giving immediate advice to subscribers" (262 U. S. 387).

The work of the Association here was purely mechanical. It never in any way commented or advised, or counseled, or estimated, or did anything else except get, and send out, the bare information within the narrow limits prescribed.

The Opinion Below.

The opinion below recites the acts performed by or through Cement Manufacturers Protective Association and the absence of any agreement, general or specific, except to engage in those limited activities.

But the opinion contains many statements indicating misunderstanding of the business aspects, the scope of the collective activities, and practical effects, and a number of controlling mistakes of fact, upon which the conclusion was rested. For clearness and brevity, most of these mistakes are corrected in connection with the discussion of the facts (*infra*, pp. 49, 58, 98, 111, 113, 115). But for certainty of definition of the activities enjoined, we respectfully mention two points here:—

(1.) The Court below was largely influenced by the general uniformity in matters of customary trade practices. Finding that they existed as now prior to the formation of the Association (*R.*, p. 1800), the opinion reasons that after a cut-throat trade war (throughout which they were the same), "the time was ripe" for an association to keep them as they were; that uniformity in them must affect prices because in some patent licenses of 1909 and 1910, fixing a minimum price on cement made under the patent, there were provisions against cutting that price by means of these practices; that disclosure tends to promote uniformity; that there was some evidence that some of the defendants desired the refusal of credit for worthless bags and of unearned discount for cash, to be uniform. But all this reasoning, with respect,

confuses general, abstract desires of any responsible manufacturer with the purposes sought or attainable through the Association, and loses sight of two controlling facts:—

(i) These practices and such uniformity as they exhibited were the natural, inevitable products of the economic factors and the same before the patent licenses or any collective activity whatever as well as through cut-throat trade war (*infra, pp. 42-76*) ; and

(ii) These practices, or departures therefrom, were not disclosed through the Association (*supra, pp. 10-22, 25-6*). So far as these practices were concerned, the competition was precisely the same as if the Association had not existed.

(2.) The Court concluded that while competition had not been entirely suppressed, “manufacturers by reason of the exchange of statistics were equipped to regulate their production and by common consent and a concert of action did so, to the end that the cement supply would at all times be a lap or two behind the demand, and thus created higher prices” (*R., p. 1808*).

The errors of fact are explained later (*infra, pp. 120-126*). To define the activities which were here obviously misunderstood:—

(i) The Association never in any way devoted a word or thought to any estimate of demand or production; and

(ii) The production statistics invariably showed merely that some manufacturer was producing very much more, some other very much less and the others various degrees in between the extremes (*infra, pp. 120-2*),

without any other possible indication whatsoever of what a manufacturer should do. Obviously, no one could take that as a guide—produce both more and less at the same time.

Thus the manufacturer had no course but to exercise his independent judgment and selfish will; and he did so, diversely, with the result that instead of production being behind demand, the defendants as a whole, at the end of each season were left with several million barrels of this perishable commodity on their hands (*infra*, pp. 125-6).

The Assignment of Errors and Questions Presented.

The errors assigned (*R.*, p. 1815-6), all of which are relied on, go to every part of the decree and group themselves to present four chief questions as follows:—

1. Whether Cement Manufacturers Protective Association is a “contract, combination * * * or conspiracy in restraint of trade or commerce among the several States” in violation of § 1 of the Act of July 2, 1890.

The first two assignments go to the first three paragraphs of the decreee (*R.*, p. 1809), adjudging the Association unlawful, dissolving it and enjoining the defendants from continuing the Association, or any part thereof, or any similar organization.

2. Whether it is unlawful for the defendants to exchange information with reference to closed contracts for future delivery of cement for specific construction work (known as specific job contracts) in order to ascertain whether they overestimate the actual requirements of the work or are duplicates held by other manufacturers for the cement for the same work.

The third assignment goes to paragraph 4 of the decree enjoining the particular information concerning these contracts heretofore exchanged (*R.*, p. 1809-10).

The fourth assignment goes to the last clause of the fifth paragraph of the decree, enjoining the exchange of any “information with reference to such contracts” (*R.*, pp. 1810-11).

3. Whether the collection and dissemination through a collective agency of information concerning either production, shipments and stocks, or shipments alone, is unlawful.

The fifth assignment of error goes to paragraph 6 of the decree, which prohibits the defendants forever from collecting even these statistics through any collective agency (*R.*, p. 1811).

4. Whether the Court should amplify the general prohibition of the statute into details which it considers suitable to a particular industry, when the acts thus forbidden have not been done or contemplated.

The remaining assignments go to the first part of paragraph 5 and paragraphs 7, 8, 9, 10 and 11 of the decree (*R.*, p. 1810-12). While these present many other questions of fact and law, they group themselves under this question. The most important, for instance, the prohibition as to all the trade practices in paragraph 9 of the decree, is only against "hereafter agreeing". It does not prohibit any past agreement or action pursuant thereto, but only future agreement. It seems to represent legislation—elaborating and making specific the general prohibition of the statute, after the manner of the Clayton Law—rather than adjudication.

BRIEF OF ARGUMENT.

I.

The Cement Manufacturers Protective Association is not a "contract, combination * * * or conspiracy in restraint of trade or commerce among the several States" in violation of §1 of the Act of July 2, 1890:—

1. Cooperation among those engaged in a particular industry or calling is a common law right not prohibited but impliedly endorsed by the statute, except when "in restraint of trade or commerce among the several States or with foreign nations".

Attorney General of Australia v. Adelaide S. S. Co., (1913) A. C. 781;

Anderson v. United States, 171 U. S. 604, 616-7;
Gompers v. Bucks Stove and Range Co., 221 U. S. 418, 439.

2. To determine the legality of the cooperation here, requires a consideration of the particular facts.

Board of Trade of Chicago v. United States, 246 U. S. 231, 238;

United States v. American Oil Co., 262 U. S. 371, 390;

Window Glass Manufacturers v. United States, 263 U. S. 405, 411.

3. That the cooperation here was not "in restraint of trade or commerce among the several States", is established by the facts that (i) the Association was organized for purposes of affording information enabling the manufacturer to protect himself against legal and economic

wrong, distinct from, and without, restraint (*infra*, pp. 90-95), (ii) the activities of the Association comprised nothing capable of suppressing, or even regulating, competition (*infra*, pp. 95-113), and (iii) its activities in fact produced no restraint but were accompanied by exceptionally sharp and strenuous competition throughout (*infra*, pp. 118-133).

4. The cooperation here included none of the elements which in other cases the Court has found to be evidence or instruments of restraint of trade.

American Column & Lumber Co. v. United States, 257 U. S. 377;
United States v. American Oil Co., 262 U. S. 371;
Supra, pp. 23-27.

5. The activities of the Association here enjoined did not provide, separately or collectively, any substitute for the independent selfish will and judgment of the individual manufacturer as to price, production or other matter capable of suppressing competition. They provided him with a limited part of the material for more intelligent judgment and efficiency, but left his individual judgment and future conduct to be exercised in his own selfish interest, without either collective direction or check.

6. The proof is explicit that the activities of the Association did not result in higher prices, curtailed production, excessive profits, inferior service or in any tendency toward monopoly; there was, in short, no result in restraint of trade, nor any injury to the public, whether competitor, dealer, contractor or consumer (*Infra*, pp. 118-133).

7. The conclusion that the Association here was not in restraint of trade is further emphasized by consideration of each activity to "estimate what strength they have separately" (*Virtue v. The Creamery Package Co.*, 227 U. S. 833) :—

II.

It was not unlawful to bring together facts concerning specific job contracts enabling the manufacturer to distinguish in advance his obligations from duplications and padding:—

1. Where the "direct", "dominant", "main" purpose and result of cooperation is to enable the individual to protect himself in the enjoyment of his legal rights against dishonesty and irresponsibility, and the effect on competition, if any, is "accidental, secondary, remote or merely probable", the cooperation is not in restraint of trade.

Swift & Co. v. United States, 196 U. S. 375, 395;
Anderson v. United States, 171 U. S. 604, 617;
United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 280;
Window Glass Manufacturers v. United States, 263 U. S. 403;
Virtue v. The Creamery Package Co., 227 U. S. 837;
Reynolds v. Plummers Protective Assn., 30 Misc., 709 (169 N. Y. 614);
United States v. Whiting, 212 Fed. 466, 476.

2. The collection of information enabling the manufacturer to protect himself against misrepresentation and

fraud in matters of credit and specific job contracts for future delivery, is within the principle of the cases just cited, as well as within the rules relating to statistical activities hereinafter submitted.

III.

The collection and distribution of information concerning either production, shipments and stocks or shipments alone is not unlawful:—

1. Information alone without comment does not necessarily suppress competition (*infra, pp. 105-8*); and here in fact those receiving the information (*i*) exercised their wills and judgments variously and diversely with respect to the only subjects to which the information related, (*infra, pp. 120-6*), and (*ii*) were not restrained from competing but stimulated to increase competitive activity (*infra, p. 104*).

2. The restraint of trade declared illegal by §1 of the Act cannot exist without some substitution of some collective will for the independent will of the individual—if voluntary, some surrender of the independence of the individual to the collective will—in something (as, often, price or production) “suppressing”, as distinguished from merely regulating or strengthening, competition.

Chicago Board of Trade v. United States, 246 U. S. 231, 238;
United States v. American Oil Co., 262 U. S. 371, 388.

The statute does not prescribe how the individual shall exercise his independent will. He may, for instance, independently wholly refrain from competition. The statute forbids only the surrender of his independence to the collective will.

United States v. Reading Co., 226 U. S. 324, 369; *United States v. United States Steel Corporation*, 251 U. S. 324, 369; *Swift & Co. v. United States*, 196 U. S. 375.

Surrender of independence to the collective will cannot exist without at least one, and probably two, essentials:—

(1) An expression of the collective will—some formulation and indication of the collective will, so that the individual may know what it is and be offered a standard of conduct to which it is possible for him to conform his future acts. Without such an expression of the collective will the individual necessarily must act independently (*infra*, p. 139).

(2) The individual's agreement, express or implied, to conform his acts to the collective will so expressed; or, lacking agreement to conform, some form of compulsion—moral or otherwise—to constrain his action.

An expression of the collective will might (or might not, according to the facts) be supplied in any one of numerous ways, as

(a) by the counsel or advice of the representative of all, the mouthpiece of the collective will, directing the course of all with respect to production and prices, as in the Hard-wood case, (257 U. S. 377), and the Linseed Oil case, (262 U. S. 371), or

(b) by some measure of future prices, as a collectively determined average cost and collectively determined average freight rate, or

(c) perhaps by mere collective discussion of future prospects definite enough to indicate a course to be followed.

There is here neither (i) any formulation or expression of the collective will indicating any standard to which the individual can possibly conform his future conduct nor (ii) any understanding or agreement concerning his future conduct, except that he shall carry on his business "exactly as he pleases in every respect and particular" nor (iii) any disclosure of details of each transaction coupled with collective audit, or other means of possible constraint.

3. Cooperation or agreement which in fact enables the individual to conduct his competition more efficiently and strongly by avoiding the weakening blunderings incident to ignorance of necessary facts, is not forbidden by the statute:—

(a) The statute "was intended to secure equality of opportunity" and promote individualism (*United States v. American Oil Co.*, 262 U. S. 371, 388). Whatever strengthens, without restraining, the individual, fulfills the purpose of the statute.

Cooperation limited to making available common facts, equalizes opportunity and promotes individualism by affording the basis for intelligent independent judgment and skill as a substitute for the "contagious optimism or equally contagious pessimism" which largely govern the unin-

formed and tend, in the long run, through many economic distresses, to eliminate the individual.

(b) The purpose and effect of cooperation limited to making available the facts, is "reasonably forwarding personal interest and developing trade" (*United States v. Standard Oil Co.*, 221 U. S. 159-60).

(c) In principle, cooperation limited to making available the facts, is like cooperation to develop improved machinery and processes through common research laboratories, strengthening each individual manufacturer and the industry as a whole, without suppressing competition. Where the "main" result is to strengthen an individual business and increase its power as a competitor and usefulness to the community, as in a partnership, even a contract in direct restraint is lawful (*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 280).

IV.

The provisions of the decree enjoining agreement on methods of sale, existing trade practices and so forth, were unwarranted by any proof of the previous existence of such agreement.

1. Only acts which are agreed on, the embodiment or product of some "contract, combination * * * or conspiracy", are within the statute.

United States v. Colgate & Co., 250 U. S. 300, 306-7;

United States v. Schrader's Son, Inc., 252 U. S. 85, 99.

(a) The customary methods of sale, for present delivery or for future delivery generally under specific job contracts, at delivered prices figured from various points of large production used as basing points, have evolved from the circumstances without collective action and have not been affected by collective action (*infra*, pp. 73, 64-71).

(b) The trade practices of individuals were not disclosed through the Association. They were not agreed upon. They were in details diverse and various (*R.*, p. 315, *et seq.*; p. 1508, *et seq.*; *infra*, pp. 79-85).

2. The matters of desirable practice infrequently mentioned in the course of meetings extending over six years—always as generalities—related only to such minor dishonesties as giving discounts when they were not earned or allowances for bags unfit for use, subjects not included in the reports (*R.*, p. 166). All the matters thus mentioned—and some of those upon which the defendants are enjoined “from hereafter agreeing” (*R.*, pp. 1811-2), as, for instance, the establishment of uniform charges for bags or the prohibition of the diversion of cement sold on specific job contracts (*R.*, p. 1812)—might lawfully be made the subject of agreement, although they never have been, since such agreements would sharpen and promote competition by preventing its disguise and thus make it more likely to bring down prices to the public (*R.*, p. 305).

Chicago Board of Trade v. United States, 246 U. S. 231, 238;

Swift & Co. v. United States, 196 U. S. 375, 394
where the injunction approved, affirmatively

*permitted agreement upon certain charges for
cartage and delivery, upon certain rules for
the giving of credit and upon certain curtail-
ment of shipments to prevent over-accumula-
tion and loss in particular markets.*

- 3.** Because it was not shown that the defendants made or contemplated the agreements enjoined in paragraphs 5, 7, 8 and 9 of the decree (*R., pp. 1810-2*), there was no basis for any injunction with respect to such matters.

United States v. Coffee Exchange, 263 U. S. 611.

V.

The decree should be reversed and the cause dismissed.

A R G U M E N T .

THE FACTS.

THE CHARACTERISTIC PHENOMENA AND METHODS OF THE CEMENT INDUSTRY.

The Portland cement industry is exceptional, perhaps unique, in the degree to which it presents certain controlling economic factors—chiefly the complete commercial identity of the product of all manufacturers and its open sale everywhere, the dominant position of the dealers, professional fully-informed purchasers, the comparative importance of the freight item in cost to the purchaser, the necessity of expensive bags as instruments of delivery, etc.

Because of these factors and the large number of independent, well-equipped competitors, competition exhibits a directness which is exceptional and results in phenomena which are unfamiliar and, in other circumstances and industries, might evidence collective control.

Many of the errors below—we think all these proceedings against these defendants—are attributable to failure to understand these factors and the inevitable economic results of them. And so particular attention to some of them seems necessary:—

I.

The Facts and Economic Factors Connected with the Well-defined Market Price—The So-called “Uniformities”.

Portland cement is a completely standardized product sold openly under true market conditions to fully-informed professional buyers. Although the superficial details are not the same, economically the condition in this industry is, and has been, comparable, in one of its aspects, to adjoining booths in a market offering, within sight of each other, identical bushels of wheat to purchasers seeing all offerings. But the common price inevitably resulting in such circumstances, is here made more stable and clearly seen by (*i*) the fact that the manufacturer must make a single price for a great output (*infra*, pp. 61-3) and (*ii*) any particular sale is secondary to maintaining a supply for, and satisfying, his regular dealer customers who are his “permanent asset” (*R.*, p. 335).

1. Portland Cement as a Vendible Commodity.

Portland cement is a completely standardized product defined and marketed by reference to standard specifications and tests, which prescribe the chemical limits, the specific gravity, the fineness, the soundness, the time of setting, the tensile strength, how the samples shall be tested, and the like (*D-1, R.*, p. 1030).

The standardization of Portland cement has not been brought about by collective activity of the manufacturers. The charge in the Petition that this “uniformity” is the result of the “combination and conspiracy” (*R.*, p. 17) has apparently been abandoned; and the evidence shows that the standard specifications, growing out of the im-

portance of having definite standards of strength and reliability in a material upon which great works and the safety of many people depend, have been formulated and given effect by users as follows:

Prior to 1912, Portland cement was defined and marketed by specifications which were substantially the same. On April 30, 1912, an executive order was issued by President Taft promulgating a standard specification, subject to revision from time to time with improvements in product, methods of testing and technical knowledge; and that specification, with such revisions, representing the result of several years' work of a joint conference representing the United States Government, the American Society of Civil Engineers and the American Society for Testing Materials, has been universally accepted as the standard by which Portland Cement is defined and marketed (*D-1, pp. 5-6, R., p. 1030, side folios pp. 1932, 1934-5.*).

Portland cement of one manufacturer is commercially identical with Portland cement of any other manufacturer, and the product of one does not command a higher or lower price in the market than that of others. The commercial identity of the Portland cement of all manufacturers, by reason of the universal acceptance of the standard specifications, is so complete that a difference of "one cent a barrel in price" is generally sufficient to turn business from one manufacturer to another (*R., pp. 181, 178, 189, 148, 174.*).

2. The Dealer is the Controlling Factor in the Distribution and Marketing of Cement.

The cement manufacturer must depend for the distribution of most of his product upon sales at wholesale

to dealers. About ninety per cent. of the cement manufacturer's sales are sales to dealers, the remaining ten per cent. being sales to Governments, municipalities, large industries and contractors, not passing through the dealers' hands (*R.*, p. 328).

The dominant position of the dealer in the industry has naturally evolved from the facts that as a practical matter the manufacturer cannot operate without the assistance of the dealer and the dealer controls the public demand for cement. Cement is shipped from the mills where it is produced to thousands of scattered points where it is used. By reason of its weight and bulk and the fact that it is ruined by exposure, there must be at each of these delivery points someone to take the cement from railroad cars, with trucks to haul it and a warehouse to receive and protect it. It has been impracticable for the manufacturer (or anyone not selling also other articles to help carry the costs) to maintain such establishments at the thousands of different delivery points for his occasional shipments. So cement is commonly sold to dealers in building supplies, who buy in carload lots, thereby getting lower freight rates, and sell to their customers at retail.

The dealer has been commonly compensated for his services by a trade discount, or differential below the price paid by the consumer, which generally was five cents a barrel prior to 1916 and then became generally ten cents a barrel (*R.*, p. 320).

The dealer's custom and good-will is the permanent asset of the manufacturer's business (*R.*, p. 335), and the manufacturer's sales efforts are directed largely towards maintaining and securing the custom and good-will of dealers.

3. The Open Market Conditions Under Which Cement Is Sold.

Dealers are professional buyers at wholesale, who follow the conduct and quotations of the manufacturers closely, are constantly informed concerning offerings of different manufacturers and commonly shop around, considering the offerings of different manufacturers, before placing their orders (*R.*, pp. 172, 174, 177, 178, 190, etc.). A few dealers carry the cement of only one manufacturer; most carry the cement of several manufacturers.

All the defendant corporations, in addition to sending written (or printed) quotations, employ salesmen who assiduously keep in the closest contact with the dealers in the territory they cover, soliciting orders, cultivating their good-will and closely watching and instantly reporting to their principals all trade news, including quotations, offerings and transactions of competitors (*R.*, pp. 147, 150, 151, 174, 178, 179, 190, 192; *D-69-72, D-74-6, D-699, D-796, D-40, D-658, D-431, D-450, etc.*).

Through his dealer customers and his contact with dealers maintained by his salesmen, the manufacturer learns by telephone and telegraph of quotations and offerings of his competitors practically as soon as they are made, and often with opportunity afforded by the dealer to meet the offering if below the market (*ib., R.*, pp. 334, 190).

4. The Well-defined Market Price of Cement.

As a result of the economic factors, for many years and more than ten or twenty years, there has been, and

is, a well-defined market price at which Portland cement sells at any particular place and time:—

(1.) In the case of a standardized article sold at wholesale to fully-informed professional buyers (according to the uncontradicted and well-supported evidence) uniformity of price must inevitably result from active, free and unrestrained competition, and such uniformity of price is normally more clearly seen than even the uniform, or market, price on a stock exchange, and remains over periods until disturbed by new factors (*R.*, pp. 294-8, 304-5, 305-6, 307).

The uncontradicted evidence was that the observations of economists to this effect were "unanimous"; had been confirmed by studies showing uniformity of price produced by competition in the wholesale salt market, crude oil in the Kansas-Oklahoma field, corn gluten, wire nails, wooden screws, sulphur, crude brimstone, and other free industries; and that the factors of heavy investment in plant and capital and a customary right of cancellation of contract by purchasers, such as exist here, tended to emphasize the inevitable uniformity. The economists whose observations were "unanimous" included John Stewart Mill, W. Stanley Jevons, Francis Walker, F. W. Taussig of Harvard, E. R. A. Seligman of Columbia, Arthur T. Hadley of Yale, John Bates Clark, Richard T. Ely, as set forth in their writings; and also Gide's Political Economy, translated by Archibald; Bullock's Introduction to the Study of Economics; Knight on Risk, Uncertainty and Profit; Carver on Principles of National Economy; Taylor on Principles of Economics; Seager on Economics; Turner on Economics; Flux on Economic Principles; Fetter on Economic Principles.

(2.) The same degree of uniformity of price of Portland cement (and of its incidents, bag charges and allowances, and cash and trade discounts) has existed without any change since long before the formation of the Protective Association or any collective activity, and as far back as any of the witnesses could remember, some going back thirty years or more.

The statement to the contrary in the opinion below (*R.*, p. 1806) is erroneous. Some of the witnesses and the period covered by the experience of each in this particular are as follows:—

Government's witness Keller, *R.*, pp. 172, 174, 175 (40 years);

Government's witness White, *R.*, p. 221 (35 years);

Government's witness Merriman, *R.*, p. 176 (30 years);

Government's witness Keller, *R.*, p. 189 (25 years);

Government's witness Kelter, *p.* 190 (25 years);

Government's witness O'Connell, *p.* 222 (15 years);

Government's witness Nawn, *p.* 218 (since 1910);

Government's witness Elliott, *pp.* 167-8, 188 (since 1912);

Government's witness Whipple, *p.* 170 (since 1912);

Government's witness Lyth, *p.* 191 (10 years);

Government's witness Wright, *p.* 220 (since 1914);

Government's witness Oakley, *p. 222* (since 1914);

Defendants' witness Morron, *p. 335* (since 1910);

Exhibits 560 to 570, Bids December, 1912, Amsterdam Building Co., 8 companies quote market price (*R., pp. 812-821*);

Exhibit 675, Exhibit 676, Base prices back to 1913 or 1914 (*R., p. 963*).

The additional facts demonstrating that such uniformity as exists, is merely a normal market price resulting inevitably from the sharp competition, and not an agreed or controlled uniformity, are brought together later on at pages 50-58.

5. The Errors in the Opinion Below Concerning the Market Price or Uniformity.

The Court below found that there is not "any compact that cement shall not be sold below a specified price" (*R., p. 1803*), but (*i*) doubted whether such uniformity would result from free competition (*R., p. 1806*) and (*ii*) said that "since the Association began to operate there has been a uniformity and stability in such quotations [of prices] that previously did not exist" (*R., p. 1806*).

(*i.*) Whether free competition, under the particular circumstances, would result in such uniformity is matter, not of law but economics. The only evidence is that it would (*R., p. 294*). The speculation to the contrary, that prices operate on an individual cost-plus basis regardless of the market, has nothing to support it and is

contrary to "the ordinary fact in commerce that happens a million times a day" (*R.*, p. 306). "In the same open market at any one moment there cannot be two prices for the same kind of article."**

(ii.) The statement in the opinion that the uniformity of prices has been different since the Association began to operate is directly contrary to the evidence (*supra*, p. 48). As a matter of fact, the period when the uniformity was most marked was during the cut-throat trade war when prices were below bin cost and far below commercial cost (*Ex. 675, R.*, p. 963). But the evidence definitely proves that the uniformities connected with price here, are the result and evidence of exceptionally sharp competition:—

6. The Proofs that Prices are Governed only by the Intensity of the Competition.

Uniformity of price in the market may result from agreement or sharp competition (*R.*, p. 305). When the uniformity is well-defined and agreement excluded by the facts, the vigor of the competition is demonstrated. That is the case here:

* Jevons, "The Theory of Political Economy", p. 90. "In no instance where there is a perfect competition can there be more than one price for the same thing at the same time." (Seligman "Principles of Economics", pp. 234-5). "There cannot be two prices for one commodity in the same market at the same time" (Clark "Essentials of Economic Theory", pp. 99-100). "If in an open market under full competition any portion of a given commodity is to be sold at a certain price, then will all the portions of that commodity sold at that time be sold at that price" (Walker "Political Economy", pp. 05-6). "When there is perfect competition there is (in a given market) only one resultant price for all buyers and all sellers", Fisher "Principles of Economics", p. 251. See to same effect authorities cited in the record, pp. 294-5.

(a) The prices of the defendant corporations did not manifest agreed-on or planned uniformity, but the kind of uniformity characteristic of a market price resulting from competition in a free market:

(a) The uniformity has disappeared during price movements in the market, following a reduction or advance by an individual manufacturer. Since the relinquishment of Government control, the periods of price movement during which quotations have not been uniform, have been: The reduction of 15 cents a barrel in response to the urgings of the Governmental Peek Committee, in April, 1919, 2 days; the advances of the next year, respectively, 27 days, 13 days, and 19 days; ignoring the succeeding individual advances not changing the general market, the succeeding large drop of 20 cents was completed in 7 days, and that of 30 cents in 3 days (*Ex. 675, R., p. 963*).

During the cut-throat competition (*R., pp. 332-3*), when prices were down below mill cost, complete uniformity in the two declines in February, 1915, was re-established in 3 days and the two succeeding rises resulted in uniformity being reestablished, respectively, in 4 and 3 days (*Ex. 675*).

These periods of diverse prices during price movements are irreconcilable with price control of any kind, because they imply great diversity in profits or losses incompatible with agreement. And the comparatively slow advance (except when below cost, *R., p. 333*) and quick decline is the opposite of what would appear under agreement or control.

(b) Occasional individual advances not followed by others, as the advances by Edison and Bath in December,

1919, the advance by Pennsylvania in April, 1920, the Alpha advance July 26, 1920, the Bath advance August 12, 1920 (*Ex. 675, R.*, p. 963).

(c) Individual price cutting reported to the Association in specific job contracts. "Price cutting" in this business means making an exceptional low price to get a particular piece of business without changing one's general price quoted to all.

In *Ex. D-641 (R., p. 1708)* Major Hulsart quotes upwards of 1100 instances of different prices in specific job contracts made at the same time and place and in effect from January 19, 1919, to June, 1921, none of which can be accounted for by dealer differential or price movement, or the like (*R., p. 351*). Some of them show four or five different prices at the same time and place (*Ex. D-641, R., p. 1708, sheets 2, 5, 7, etc.*).

The Government's witness Mr. Lewis testified, in substance, that among 928 specific job contracts which he had selected at random in the reports, he found about 5 per cent. taken at prices departing from the market price, for which he could not account (*R., p. 250*).

(d) Individual price cutting in the current business not reported to the Association (*R., pp. 177, 181, 183, 223; D-658, p. 1717; D-436, p. 1459; D-451, p. 1469; D-460, p. 1474; D-458, p. 1472; D-470, p. 1481; D-490, p. 1496; D-489, p. 1495; D-454, p. 1471; D-247, p. 1141; D-229, p. 1134; D-426, p. 1455; D-463, p. 1478; D-556, p. 1658; D-388, p. 1435, etc.*)

These characteristics, the disappearance of the uniformity during price movements, the occasional individual advances not followed, and the price-cutting report-

ed and known to other manufacturers but occasioning no comment or action, define the prices here as normal market prices resulting from sharp competition in the standardized article, as distinguished from agreed or controlled uniformity of price.

(b) The uniformity has appeared and disappeared as the competition has increased and relaxed.

During the cut-throat trade war, when prices were down below mill cost, the uniformity was most marked. The uniformity then was obviously due to competition. During the summer of 1920, the uniformity largely disappeared and prices were as much as a dollar a barrel apart, and the competition in the market was then relaxed by the failure of transportation facilities (*Ex. 675, R., p. 963; p. 148, etc.*). In other words, the uniformity appears when one cause, competition, is operating and any other cause excluded, and in accordance with the degree to which that cause is operating; and moreover does not appear in accordance with the operation of any other suggested cause.

(c) The same degree of uniformity existed when there was in fact no other possible cause but the competition, before any association or collective activity (*supra, p. 48*).

(d) There was no uniformity in the price the manufacturers received.

The price realized by each at his mill, the amount of business each did, the profits each made, all varied widely

and diversely (*infra, pp. 127-133*). The only uniformity was out in the market where the competition operated.

(e) Where there was no dealer market, there was no uniformity but diversity.

Where the factor of open market condition was absent, although the business was of the utmost importance from the manufacturer's point of view, and most likely to be subject to any control, as in supplying cement for the Panama Canal, there was no uniformity, but diversity (*R., pp. 283-4*). In other words, the so-called uniformity was found only where the economic factors which necessarily produce it were present.

(f) The uniformity here involved loss of profits through reduction of price realized on the product shipped from the points of large production.

It involved, for instance, the Lehigh Valley manufacturers, the largest group, cutting the price received by absorbing freight on every sale freightwise nearer Universal or Alsen or Hudson or Fordwick, a very considerable part of their markets, to prevent their business being taken from them by the competition from those points. The conflicting individual interests thus prevailed over any imaginable collective desires of the manufacturers as a whole (*infra, pp. 67-70*).

Most important and conclusive, the evidence proves that prices were in fact made by independent action of the individual manufacturer in competition with the others:—

7. How Prices Were in Fact Made.

In view of the failure of the Court below to understand prices in this industry, it may be desirable to refer to evidence showing concretely just how prices were in fact made and how the activities of the Association had nothing whatever to do with it.

The general considerations which govern a manufacturer in fixing his prices are summarized in the testimony of Mr. Morron (*R.*, p. 335). Here, as elsewhere, "the dealer is the permanent asset"; and the controlling consideration is always to supply and satisfy one's dealers.

A decline in the market price when enough cement is offered at a less price, explains itself. A manufacturer may also be forced to advance his price to avoid being swamped with contracts to such an extent as to be unable to supply and so keep his dealers:—

A particularly clear collection of contemporaneous records resulted from the fact that Mr. Morron, the President of the Atlas Company, was away at the time of the extraordinary conditions and consequent price advance in the early Spring of 1918. On March 20th, Mr. Thompson, of the Atlas Company, heard a report that another company had advanced its price 40 cents a barrel, at Montgomery, N. Y., and after trying unsuccessfully to reach the office by telephone, on the next day telephoned and wrote the information to the Atlas Company (*D-67, R.*, p. 1076). On March 21st, a salesman telephoned that a dealer in Newark had quotations from Giant and Bath advancing their prices 40 cents a barrel (*D-68, R.*, p. 1076). On the same day, another salesman telephoned that other dealers say that Bath and Dexter had raised their prices 40 cents per barrel (*D-69, R.*, p. 1076). Other similar tele-

phone messages arrived at the Atlas Company (*D-70, D-71, D-72, D-74, D-75, D-76, R., pp. 1077-8*). On the same day, Mr. MacFarland, of the Atlas, telegraphed to Mr. Morron, at Hot Springs, Arizona:—

“Half dozen smaller companies prices seem to be up forty cents per barrel. No information regarding any change of others. Situation well in hand. Watching carefully. Will act if advisable” (*D-80, R., p. 1080*).

Mr. Morron telegraphed in reply:—

“Message received. Go very slow on orders and especially contracts. Confer daily with Miner [another officer of the Atlas Company] regarding manufacturing and shipping prospects. Do not let them load us with business we cannot ship especially at prevailing prices. Keep me continually posted” (*D-81, R., p. 1080*).

On the same day, Mr. MacFarland again telegraphed to Mr. Morron:—

“Further information from dealers indicates practically all competitors’ prices increased forty cents per barrel including export. When I am positive that this information is correct do you desire me to follow?” (*D-82, R., p. 1080*).

The next day, on March 22nd, Mr. Morron replied by telegram:—

“Message received. Yes when you get definite information from trade act promptly. We cannot afford to be overloaded with shipping and manufacturing conditions so uncertain. Fight shy of contracts. Keep me posted as to volume” (*D-83, R., p. 1081*).

On March 22nd, the Atlas Company received by telephone word that dealers had Alpha written quotations 40 cents up (*D-74, R., p. 1078*), these quotations being dated the day before (*D-77, R., p. 1078*).

On March 22nd, instructions were given to issue the Atlas quotations at the advanced price (*D-87, D-88, R., p. 1082*), and on March 23rd, Mr. MacFarland telegraphed Mr. Morron:—

“Our prices in hands of trade this morning forty cents advance” (*D-84, R., p. 1081*).

The telegram gave the amount of business taken and said:—

“Have been able to refuse without hurting us about two hundred thousand barrels future business. Situation in hand perfectly”.

As further interpreting the importance of a manufacturer not getting loaded up with contracts for future delivery when costs are advancing, we quote from a further telegram from Mr. Morron to Mr. MacFarland, dated March 25th, 1918:—

“Don’t accept any business except daily dealers until Miner notifies you of Government decision on operation. We must have free cement to sell later. This applies both east and west” (*D-86, R., p. 1081*).

Other clear instances in the record are a change by the Security Company in February 1921 (*D-522, D-502, D-501, R., p. 1501-2*) ; a change by the Hercules Company in 1920 (*D-42, D-44, D-45, D-46, D-47, D-49, D-50, R., p.*

1059, *D-746, R.*, p. 1764, *Ex. 675, Ex. 676, R.*, p. 963, *D-41, A.*, p. 1059); the reduction of the Dexter price at Meriden (*D-544, R. p., 1650, D-545, R.*, p. 1651).

Any fair reading of the record makes it certain that the activities of the Association had no slightest connection with price making and that these defendants were most actively competing.

8. The Error in the Opinion Below concerning the Purpose of reporting the Price in Closed Specific Job Contracts.

With that illustration in mind, it is plain that the Court below erred in ignoring the evidence of the actual declared purpose of including the price in the reported facts concerning specific job contracts (*R.*, p. 353, *infra*, pp. 93-4) and reasoning that the purpose was to allow the manufacturer to deduce therefrom prices of other concurrent sales (*R.*, pp. 1804-5).

A report of any price relayed by mail from the field where the contract was closed to the manufacturer's office, thence to the Association and thence to the members, could add nothing whatever to his information concerning existing market prices (*R.*, pp. 334-5). It could serve no purpose except:—

“if a report came in, for instance, that the New York Central had placed an order with a competitor for 10,000 barrels at \$1.25, and \$1.25 was our price, it would naturally make me think that the reason we lost the order was because the other fellow had a better salesman. It was a question of checking up the salesmanship with me more than

anything else. The prices would not be of any use in giving me a line on current prices. We got current prices instantaneously from dealers. We got those over the telephone. These prices through the Protective Association came in about a week afterward." (*R.*, p. 334).

Thus the report of *only* these prices merely contributed to make salesmanship, and so competition, more effective.

II.

The Facts and Economic Factors Connected With Selling at Delivered Prices Computed from Basing Points.

Because cement is cheap, heavy and must be protected in transit, freight is an exceptionally important part of the cost to the purchaser, often equaling or exceeding the cost of the cement. The purchaser wants to know what he must pay to get his cement and cannot, as a practical matter, figure out the freight rate (*R.*, pp. 330-1). So since before any collective activity in the industry, it has been customary to sell at delivered prices (*R.*, p. 330, *D*-538, *Letter of June 3, 1901*, *R.*, p. 1648).

That method of selling seems to be mistakenly attributed in the opinion below (*R.*, p. 1802) to certain patent licenses which some held in 1909-1910 (*considered infra*, pp. 86-88). It was the method used in selling cement before that; and it is the necessary method if there is to be competition between different producing points in this industry. Accordingly, we try to make plain the essentials as they have always existed:—

1. The Two Parts of the Price of a Manufacturer's Cement in any Market.

The price at which any manufacturer's cement can be bought and sold at a particular place and time necessarily is divisible into two parts, to wit:—

(i) The price of the cement (and its incidents, bags and discounts) named by the manufacturer at some point of production (for instance, his own mill), as the price at which plus freight he offers cement in markets freight-

wise contiguous thereto, known as a base price or price at a basing point. This part of the price in any market is determined by the manufacturer and within his control, and cannot be fixed without his action on it.

(ii) The cost of transportation, or freight, from such point to the particular market. This part of the price of his cement in the market is not determined by the manufacturer or within his control, but is fixed by a purely mechanical, or ministerial, application of rates established by the railroads under the jurisdiction of the Interstate Commerce Commission.

The manufacturer can and does determine what point or points of production he will use as basing points—for illustration the freight station nearest his mill—and what his price there shall be, but he cannot control the freight therefrom to markets; and his base price is ramified into different prices in the contiguous markets automatically by the mechanical addition of the official freight rates (*R.*, p. 331).

2. The Manufacturer's Base Price Must be a Single Price Covering a Particular Period.

The cement manufacturer normally makes (and is compelled by the requirements of his business and law to make) his base price at any point of production or basing point, a single price covering substantially all transactions within a particular period, as distinguished from a separate price for every offering and sale.

That price may be any amount and the period short or long, in the discretion of the manufacturer, but it

must be one price, *in general*, while it lasts. The reasons for this are:—

(a) It is impossible to conduct a large business by treating each sale as an isolated transaction, because the price of the product has to be made with reference to the manufacturer's financial, manufacturing and inventory positions and market conditions, actual and prospective, by the responsible head, and cannot in the nature of things be determined afresh and differently for each offer and sale throughout a large territory, many times each day (*R.*, pp. 335-6). He must name his price and then shop around for customers at that price.

(b) Any different treatment of different dealers (in markets wherein news travels "awful fast" (*R.*, p. 190) would inevitably forfeit the custom and good-will of dealers, the preservation of which is essential to the conduct of the manufacturer's business (*R.*, pp. 285, 330).

(c) The one price policy is the only fair, sound business policy, endorsed by courts which have considered it (*Steel case*, 223 Fed. 55, 91-2) and compelled by legislation whenever it has touched prices as in regulating prices of transportation and public utility services, and, since 1914, in regulating interstate commerce, by the Clayton Law (38 Stat. 730, C. 323, §2).

As President Hadley of Yale said in his book on economics, p. 82:

"A one-price system is a most important element in commercial honesty, is secured by intelligent competition and defeated by ignorance."

So generally and normally (except for a certain, and very considerable (*supra*, p. 52), amount of price-cutting in particular transactions) the cement manufacturer makes one base price at any basing point he uses, covering all his offerings controlled thereby, until he changes it.

3. The Mechanics and Effects of Adding Freights to a Manufacturer's Base Price.

When a base price is named by a manufacturer at any point of production, his prices in all markets freightwise near that basing point are his base price there plus the different freights therefrom to such markets. The addition to the base price of the different freights to the great number of different points where purchasers buy cement, is a mechanical operation (*R.*, p. 331).

So a manufacturer's prices at any production point used as a basing point and throughout its freightwise contiguous markets, are in effect a single price determined by him, which is ramified mechanically (by adding thereto the freights to those different markets) into differing prices in such markets all bearing a fixed relation to each other through freights to the basing point.

The mechanical part of a manufacturer's prices, the freight rates from his basing point or points to delivery points in territory freightwise contiguous thereto, changes much less frequently than the part determined by the manufacturer. The official tariffs give freight rates in tons, and cement is sold by the barrel of 380 pounds. Freight tariffs are mechanically most burdensome to consult and not easily interpreted correctly by

anyone but an expert traffic man. Probably from these factors, there developed long ago a convenient instrument for the mechanical addition of freight rates to base prices:—

As a necessary mechanical incident of the two distinct parts of the price of cement, it has long been customary for the manufacturer to prepare lists of freight rates wherein official freights are translated from tons into barrels of cement, and give these to his sales offices and salesmen, so that upon receiving from time to time from the manufacturer the price named by him as his price at a basing point, the members of his selling force could mechanically add the freights and thus tell customers at the thousands of points throughout the territory, the price at which the manufacturer offered cement to them. (*R.*, p. 331). Some manufacturers, Atlas, Alpha, Lehigh, Edison, and others, individually put their lists in the form of printed books having the same form and contents as the books subsequently published collectively (*R.*, pp. 147, 150, 338, *Exs. 3-11*, *R.*, p. 353).

4. The Points of Production Used as Basing Points.

The use of different basing points in this industry, unlike the use of a single point in some others, is the product and necessary instrument of vigorous competition. Neither the use of basing points nor the point or points so used by any manufacturer, has been brought about or affected by any collective activity.

The points of production which have been (or, for that matter, necessarily will be) used as basing points

are those points of production at which any individual manufacturer has named a base price reducing market prices in territory freightwise contiguous thereto. When that occurs, other manufacturers have to meet the prices resulting in those markets, or else not sell in those markets, reducing the prices realized by them from sales in that territory so far as necessary to meet the new prices. The mechanical part of meeting such new prices consists of naming a price at the new basing point, which mechanically ramifies itself by the addition of the freights therefrom, to the lowest prices in those particular markets (*R.*, pp. 331-2, *infra*, pp. 67-8).

The points of production heretofore used by any manufacturer as basing points have been:—

The Lehigh Valley naturally developed as a basing point from two facts: (*i*) in this country Portland cement was first produced in the Lehigh Valley, the dominating early point of production being specifically the large mill of the Atlas Company at Northampton (*D-275, R.*, p. 1294); and (*ii*) as other mills were constructed on that geological deposit, the different railroads serving the region, to get tonnage, gave the mills which located on their lines freight rates to the markets, enabling those mills to ship in competition with the then dominating mill at Northampton; and there thus developed a blanket rate of origin from all the mills in the Lehigh Valley, since endorsed and extended by the Interstate Commerce Commission, so that freight rates from all the mills in the Lehigh Valley to practically each point of delivery have long been, and continue to be, equal and uniform, and

commonly determined with reference to Northampton (*R.*, pp. 245-6; *D-251 to D-254*; *R.*, p. 264-5).

For many years the Lehigh Valley was the only point of production, and all prices were then the manufacturer's base price at his mill in the Lehigh Valley, plus freight to the point of delivery (*R.*, pp. 283, 331).

Thereafter, when cement came to be produced at other points, the manufacturers at such points naturally at first offered and sold their cement in the markets at prices made with regard to the existing market prices based on the Lehigh Valley; and thus the Lehigh Valley continued for a long time to be the only basing point (*R.*, pp. 331-2).

Comparably with that, on the edges of the Lehigh cement rock deposit there have developed by the building of additional mills, some exceptional local individual freight rates, different from, and not yet supplanted by, the general group rates, particularly from the mill of the Edison Company at New Village on the extreme eastern edge of the group to freightwise nearby points in New Jersey, and from the mill of the Allentown Company, the extreme westerly mill, to some nearby points as Reading, which have naturally had no effect in establishing additional basing points at those particular mills for only that small local business.

As production at other points increased, some manufacturers at such points severally came to offer and sell cement in the markets freightwise nearer their mills, at prices representing the sum of a base price at such manufacturer's mill plus freight therefrom to destination (*R.*, pp. 331).

Basing points have thus been established by manufacturers located at the largest points of production, to

wit, Universal, Pa. (with a production of more than 3,000,00 barrels), Hudson, N. Y. (with a potential production from two mills of nearly 3,000,000 barrels), Alsen, N. Y. (with three mills producing nearly 2,000,000 barrels). (*Ex. 385, R., p. 706.*)

Since the formation of the Protective Association, and while it was operating, the Lehigh Company commenced thus to base its prices in the territory freightwise contiguous to its mill at Fordwick, Va., upon that mill as a base, thus pulling down prices throughout that territory, which other manufacturers were forced to meet (because although the Fordwick mill alone is small, the Lehigh Company, from its other mills also, could supply all demands in the territory at such prices) and Fordwick has also become a basing point (*Exs. 5, 8, 11, 12, R., p. 353.*).

None of the other mills of defendants, serving this territory (to-wit, the comparatively small, isolated mills at Glens Falls, N. Y., Jamesville, N. Y., Cayuga, N. Y., and Security, Md.) has yet sold at prices based on the mill. All are in the first natural stage of development of a new point of production, where they sell with regard to the market prices based on points of larger production.

5. The Fact that the Cement Manufacturer is Compelled to Base Some of His Prices on Basing Points Other Than His Mill.

Prices in markets computed by adding freight to a base price at one basing point, would necessarily be higher in some markets than the market prices of cement there based on another freightwise nearer basing point;

and the manufacturer using only one basing point could not compete in markets freightwise nearer other basing *points (*R.*, pp. 331, *supra*, p. 44).

For instance, prices based on a manufacturer's mill in the Lehigh Valley with freight added, because of higher freights, will be higher in New York City than the prices there of cement from Hudson or Alsen; higher in Buffalo, N. Y., than the price of cement from Universal; and so on. The manufacturer in the Lehigh Valley has to meet these lower prices or not sell. He knows that the price of Hudson cement in New York City is simply a mechanical freight ramification of prices of Hudson cement up through New England; the price of Universal cement in Buffalo, N. Y., a similar freight ramification of the price of that cement in Washington, D. C.; and so on. He knows that it would be silly for him to name the lower price only at New York City or Buffalo, leaving the ramifications of the Hudson or Universal prices in other markets below the prices at which he is trying to sell there; and so he meets the lower Hudson or Universal prices everywhere by naming a base price at those basing points and letting it ramify itself by the mechanical addition of freight rates from those points of production throughout freightwise contiguous territory.

The customary and inevitable use of different basing points in this industry operates practically thus: The base price named by a manufacturer at any point of production or basing point is determined by him and cannot be fixed without his action. When he reduces his price at a particular basing point, say, Universal or Hudson, that automatically brings down all market prices

throughout a particular section of the country. That section is measured by the combination of comparative freight rates, plus the extent of the reduction. If the reduction is 5 cents a barrel, it will bring down prices throughout less territory than if the reduction is 10 or 20 cents a barrel. So cement may be selling in a particular market to-day at a price based on one point of production, and by reason of some manufacturer reducing his price at another point of production, cement in that market may sell to-morrow at a price based on another basing point. It is not partial competition at some points, but thoroughgoing competition, direct with the rival at all the reachable markets where he sells.

The market price of cement in any market, under the acute competition thus evolved, is accordingly the smallest sum resulting from adding together the price charged by any manufacturer at any point of production and the freight therefrom to the particular market.

6. Selling at the Lowest of the Delivered Prices Computed from Several Basing Points, is the Product and Means of Severe Competition and Nothing Else.

(i) It has in fact existed just as it exists now (the Lehigh Company putting in prices based on Fordwick as an additional basing point, being an example and not an exception) since prior to any relevant collective activity and has not been affected by any collective activity (*R.*, pp. 331-2).

(ii) Basing prices on production points other than the manufacturer's own mill, means loss to the manufacturers collectively:—

It probably means better profits to the few small scattered mills, in so far as they can sell their output at the market in nearby places by reason of the better service in deliveries, etc., which results from their location. As long as they remain comparatively small and scattered, they can dispose of their output and profit to that extent by their freight advantage, although increased costs of fuel and material diminish the apparent advantage.

But the four such mills in this territory belonging to members of the Protective Association (at Glens Falls, N. Y., Jamesville, N. Y., Cayuga, N. Y., and Security, Md.) together, and disregarding their scattered locations, produce only something like two million barrels of cement as contrasted with something like twenty-eight million barrels produced by the other mills of the members of the Association. These twenty-eight million barrels are sold, in nearby places, at prices based on the mills where they are produced and, in other places nearer competing points of production, at prices cut below such base prices at the mill by basing upon other producing points and absorbing the freight disadvantage to hold the markets (*Ex. 374, R., p. 706*).

A customary practice obviously evolved by and adapted to meeting, promptly and exhaustively, the lowest prices at which the product is offered anywhere, which involves constant cutting of the price received, to keep or get markets, and so an otherwise unnecessary loss by mills doing more than 90 per cent. of the business, cannot be attributed to the collective will or to anything but free and severe competition.

The Protective Association has not touched basing points, or the use thereof at all. It has only cheapened (and made more accurate by better checking of rates) without changing, the purely mechanical instrument found necessary for the practical conduct of the cement business, by publishing the freight rates from every point that anyone has used as a basing point once in lieu of the former individual publications of the same thing by the separate manufacturers.

III.

The Customary Methods of Sale Evolved in the Industry.

Cement has been sold for either present delivery or future delivery. The characteristics of such transactions in the industry have been as follows:—

Sales for present delivery represent sales practically from stock when costs and market conditions are known. They constitute the regular current business of the manufacturer wherein the dealer buys at wholesale in carload lots and sells to the public at retail. Such sales constituted 84 percent. of all the business of the defendant corporations in 1919, 75 percent. in 1920 and 70 percent. in other years (*R., p. 162*).

Contracts for future delivery relate to cement to be made in the future (because deterioration and cost preclude much storage) when costs and market conditions are unknown, and accordingly involve a material element of risk.

Contracts for Future Delivery.

Contracts for future delivery of cement have been customarily made and treated on the understanding that the purchaser (*i*) pays no consideration whatever except after the delivery of the cement to him, (*ii*) is not required to take the cement unless he wants to when the time of delivery comes, and (*iii*) is not held to the price named in the contract, but if the market goes down gets the benefit of the reduced price, whereas the manufacturer, if the market price advances, is held to the con-

tract price (*R.*, pp. 149, 152, 179, 183, 188, 190, 191, *D-517 A-S No. 34*, *R.*, p. 1508).

By reason of the one-sided optional character of contracts for future delivery, developed by the competition of the manufacturers for business, a contract to deliver cement in the future for resale, when costs and market conditions are unknown, would necessarily amount to the manufacturer obligating himself to deliver cement at the present market if the price should advance (so that the purchaser could then resell it and reap a profit) or at the future market if the price should decline, without receiving any consideration whatsoever therefor or even an enforceable obligation to take the cement.

The more usual method of dealing with futures differs from such an absurdity in just one particular, to wit, the contract is not for the future delivery of cement for resale, but to supply the cement entering into a particular piece of construction, as a dam or concrete road or building, known as a "specific job."

The Practical and Legal Value of Specific Job Contracts.

The specific job contract has been generally used in the industry (the same as now) since many years prior to any association or collective activity. (*D-517 B*, No. 11, goes back to 1898; *D-517 B*, No. 17, to 1903, *R.*, p. 1508, *R.*, p. 149, *R.*, p. 170-1).

As far back as 1902, one of these specific job contracts for cement, dated 1897, of a manufacturer not defendant herein, had found its way to the United States Court of Appeals, *Wolff v. Wells Fargo*, 115 Fed. 32.

It is difficult to conjecture how any other method of dealing in futures could have evolved out of the particular circumstances of this industry. For instance, a specific job contract in evidence related to supplying 15,000 barrels of cement to a dealer in Kaiser, West Virginia (a town of about 1000 inhabitants) for use in building a road (*R., p. 164, Ex. D-3; R., pp. 1035-6*). The dealer obviously could not use any such quantity of cement in that locality, except in that work, and if required to take it notwithstanding the fact that the work was abandoned, would probably be ruined. The manufacturer, while willing, or forced by competition, to guarantee the price on all cement entering into that work, could not (without actual consideration or ability to secure practical performance) undertake a one-sided gamble on the future price of cement. The natural, if not inevitable, transaction was a contract wherein the supplying of cement for the specific job constituted "the substantial engagement" (*Brawley v. United States, 96 U. S. 167*).

The limitation on the obligations, to supply cement to, and use the cement only in, the job and not to furnish, or call for, cement for resale, has long been recognized by the courts:—

A recent case in which such a contract was examined is *Maryland Dredging Co. v. Coplay Cement Mfg. Co.*, 265 Fed. 842. The contract covered 225,000 barrels of cement for the construction of a Dry Dock in the League Island Navy Yard, Philadelphia, and contained the following customary limitation:

"The quantity of Saylor's Portland cement mentioned is for use in the work described, and if buyer shall sell or otherwise dispose of any por-

tion of said cement, or use portion thereof in any work other than described herein, or fail to comply with terms of payment or any of the conditions and limitations in this agreement, the cement company may at its option, decline to make further deliveries hereunder; the buyer remaining liable for all unpaid accounts" (p. 843).

The buyer sued for failure to deliver the cement, but did not prove that the cement was required for the specific job in question. The court set aside a verdict for the plaintiff, saying:

"In the present case there was no averment in the statement of claim that 225,000 barrels of cement was the quantity required for the construction of the dry dock, nor was there proof at the trial that that quantity was required. The contract clearly falls within the class where the quantity, although approximately stated, is to be determined according to the plaintiff's requirements for the construction of the dry dock, for it is agreed that it shall not sell it, nor use it for any other purpose, and whether the quantity stated is more or less than the quantity it is entitled to call for depends upon the requirements of the contract so long as it acts in good faith" (pp. 844-845).

In *Ferguson Contracting Co. v. Helderberg Cement Co.*, 145 A. D. (N. Y.), 494, a specific job contract was entered into for the cement required to build a lock at Waterford, N. Y. The purchaser subsequently made arrangements with a contractor who agreed to do the work and furnish the materials himself. Thereafter the purchaser attempted to obtain delivery of the Helderberg

cement. The cement company refused to deliver and the court held that the cement company was fully justified because the purchaser had incapacitated himself from using the cement in the work for which it was to be furnished.

In *Wolff v. Wells Fargo & Co.*, 115 Fed. 32 (CCA 9th), the court enforced a specific job contract in favor of the contractor and against the cement company. In that case the contract covered the cement requirements for a specified building "about 5000 barrels more or less". The purchaser, after using 5000 barrels of the cement asked for an additional amount required to complete the building. The court sustained the contract and held the vendor liable for the additional amount.

The practical operation of specific job contracts is this: The purchaser using the cement in the specific job calls for deliveries from time to time as the work progresses and after delivery pays the manufacturer the price named in the contract if the market has advanced, and the market price if the market has declined. Others holding duplications or specific job contracts to supply the cement requirements of a job not to be constructed, cannot in the nature of things order cement to be supplied for the job or perform their part of such contracts, send in no order for cement for the job and simply ignore their contracts, which eventually expire,—unless they resort to them for purposes of fraud.

The Associations Mentioned in the Record.

The record mentions four associations, only one of which, Cement Manufacturers Protective Association, is before the Court for adjudication. The other three are

1. The Portland Cement Association, herein called the National Association, which has been continuously active since 1902, chiefly in promoting the use of cement.

2. The Association of Licensed Cement Manufacturers, which ended with the year 1910, connected with operations under a patent on apparatus for making cement by burning pulverized coal.

3. The Eastern Association, which was tentatively organized in 1912 by the eastern manufacturers who had left the National Association, to do its work in the East, and abandoned in a few months when they rejoined the National Association.

The matters connected with them, which have received consideration here, are as follows:—

1. The National Association.

The Portland Cement Association herein called the National Association is composed of practically all manufacturers of Portland cement in the United States. Its principal activity has been to increase the uses of cement by research work to develop the best uses, the employment of engineers to supervise the construction of roads, to see that they are properly made, the introduction of uses of cement on farms, the use of cement in structural

work and many other branches. It has similarly worked to bring about the prevention of accidents and to prevent waste by developing methods of economizing fuel, preventing dust, economizing grinding, and the like. Until the decision of this Court in the Hardwood case, it also collected and distributed to its members statistics of production, shipments and stocks on hand. (*R.*, pp. 195-204).

The only part of the activities of the National Association questioned by the Government, we understand, are those relating to trade practices.

Trade Practices.

Among the studies made by the National Association was one of trade practices in the industry. Many details of practices found existing in the industry, were studied by a committee from all over the country, who embodied their conclusions in a report discussing the effects of various ways of dealing with details on the manufacturer, trade and public, and recommending certain practices as ideal. This report was adopted by the Association and printed, the first edition in 1915 and the second edition in 1916, which was reprinted in 1919 (*Exs. 243-5, R.*, p. 664). The report did not represent an agreement, but made recommendations on the understanding that every manufacturer was free to adopt or reject any or all of them as he chose (*Ex. 244, p. 3, R.*, p. 664).

The customs and practices of the industry present two characteristics: (*i*) Generically, the customary methods of sale by the barrel at delivered prices computed by adding freight to base prices at points of production

used as basing points for present delivery or future delivery usually under specific job contracts, have been practiced for more than twenty years by manufacturers generally, and (ii) in the details mentioned in the Report, the practices of the different defendant corporations have been diverse and various (*R.*, pp. 316-321; *D-517 A-S*, *R.*, p. 1508).

The diversity in the practices of the nineteen defendant corporations with respect to the points mentioned in the Trade Practice Report of the National Association is shown by quoting from the Government's bill, merely adding after each paragraph the facts:

1. "Defined a dealer". None of the nineteen defendants has ever limited its sales at the dealer's price to persons fitting the definition, except the Pennsylvania Company, which has done so since before the report came out (*R.*, p. 320).

2. "Defined a consumer". The definition was that all not dealers are consumers; and so eighteen of the defendants have not acted according to that definition.

3. "Suggested that dealers be discouraged in making sales of cement in carload lots at a smaller margin of profit than 10 cents a barrel". That is an unfair statement of the Report, because after dwelling on importance of securing the assistance of the dealer "in pushing the use of cement in competition with other materials", and saying that it is to the cement manufacturer's interest to have the dealer make a fair margin of profit on cement, it merely says: "One of the surest ways to accomplish this is to help dealers to inform themselves on the cost of doing business, a result of which will be to discourage them from selling cement for carload delivery at a

smaller margin than ten cents per barrel". (*Ex. 244, p. 4.*)

None of the defendants has made any effort to discourage dealers from making sales at a smaller margin of profit than ten cents per barrel. (*R., p. 321.*)

4. "Suggested that the customary cash discount be not allowed unless remittances were made actually within 10 days from date of invoice". Fifteen defendant companies have not strictly enforced the ten day period; four have. (*R., p. 317.*)

5. "Suggested that payment of commissions to dealers on sales made directly to consumers be discontinued". Fifteen of the defendant companies have continued to pay such commissions. Three never have. One has declined to pay them since the report (*R., pp. 320-1.*)

6. "Advised against making quotations to dealers for delivery at towns other than their home towns, except under certain conditions". Seventeen of the defendant companies have always acted directly contrary to the advice. Two have always followed the course advised. None has changed on account of the report (*R., p. 320.*)

7. "Suggested a form of contract for use by dealers in connection with specific work contracts and urged that its use be insisted upon". Seven companies have never required the execution of a formal contract after quotation had been accepted by the dealer. Three companies always followed that practice. Eight have followed the practice since the report. One, which had required such a contract up to the time of the report, dropped it after the report came out, in 1916 (*R., p. 318.*)

8. "Suggested that dealers be required to make

monthly reports of deliveries on specific work contracts 'in order that the misuse of cement by dealers may be eliminated,' and provided a form for that purpose". Thirteen of the defendant companies have never done this. One has always done it. Five have done it since the report came out (*R.*, p. 319).

9. "Defined a blanket contract * * * and advised that 'the practice of making blanket contracts could not be too strongly condemned.'" Fourteen of the defendant companies have always made and still make some blanket contracts and their practices have been unchanged by the report. Three have never made them. Two have not made them since the date of the report (*R.*, p. 319).

10. "Recommended a form of 'salesman's order blank.'" Fifteen of the defendant companies have never used such an order blank. Three have always done so. One has done so only since the date of the report (*R.*, p. 320).

11. "Suggested that in order to keep the situation more nearly in the control of the cement company all trade quotations should be for immediate acceptance, 15 day shipment, and for not more than one carload each, and provided a form for use in that connection." The report referred to the plan of sending broadcast thousands of unasked quotations and the enormous potential obligations of each company unless limitations as to acceptance, quantity and date of shipment were inserted in such quotations. The recommendation had to do not with actual transactions, but with arranging quotations so that the manufacturer would not find himself involved in contracts he never meant to make and beyond his ability to perform, through the acceptance

of unlimited quotations. The control was simply arranging matters so that the individual seller's mind would in fact have to meet that of the buyer. These limitations have appealed to practically all the defendant companies only three or four sending out their general trade quotations without such limitation. But there has been considerable variation in the details (*R.*, pp. 316-7).

12. "Advised against granting extensions in time of delivery." The report did not advise against granting extensions in time of delivery, but only that a clause be inserted in contracts which would enable the manufacturer to enforce the delivery date. One of the defendant companies always followed the practice. Seven of them have never used it. Six have used it since the recommendation, but one of those dropped it almost immediately after adopting it. Five have put it in their quotations, but never enforced it (*R.*, p. 318).

13. "Suggested that dealers be required to state in their bids the brand of cement they proposed to furnish." None of the defendant corporations has ever done this. (*R.*, p. 321).

14. "Defined specific work as a job requiring a car-load or more of cement for a specified period of time beyond 15 days." There was no recommendation here. It was simply a definition of the subject matter to which other suggestions applied.

"15. "Suggested that quotations for specific work should be for acceptance within 5 or 15 days, etc." The Report discussed how long a quotation at a particular price should be acceptable, on the general theory that "the longer the acceptance period the greater are the manufacturer's potential obligations and such obliga-

tions, particularly in an active market may be undesirable." The effect of a limitation on the period of acceptance of a quotation is of course merely to give the manufacturer a chance to revise his offer if the period is exceeded. Sixteen of the defendant corporations limited their specific job quotations to acceptance within 15 days. Three have never done so. (*R.*, p. 318, *Ex. 244*, p. 12.)

16. "Suggested that specific work sales contracts should accurately describe the work as to location, character, name of owner, contractor or other party doing the work, and provided a form to be used." Such a description of the work for which the cement is to be supplied has always been an inevitable part of a specific job contract, which is differentiated from other contracts by the fact that it is limited to supplying the cement entering into a specific piece of work. The description of the work is, of course, a blank in all forms of contract.

17. "Suggested conditions under which sales should be made to railroad companies, etc." Six of the defendant corporations have acted in accordance with the suggestion as to railroads. Thirteen have acted otherwise, and never in accordance with the suggestion (*R.*, p. 319).

18. "Suggested that 'when quotations are issued covering a change in price, the change in price should be made effective on the date quotations are written' in order to avoid price tipping." The Report pointed out that in a few cases the manufacturer had sent out notices to the effect that in 5 days he would advance his price, which the Committee thought unbusinesslike as tending to cause dealers to defer their purchases, not to keep their stocks at a level to meet demand, foster specula-

tion, etc. (*Ex. 244, p. 15*). None of the nineteen defendant corporations has ever done this, with one exception, and that exception has continued to give advance notice of its change in price (*R., p. 321*).

19. "Advised against guaranteeing prices against decline." One of the defendants, Glens Falls, always had a written guarantee against decline. None of the others had such a written guarantee until 1918 or 1919, although in practice the buyer under a specific job contract always got the benefit of any reduction in the market price (*R., p. 321, D-517 A-S No. 34, R., p. 1508*). Since 1918 or 1919 all the defendant corporations have guaranteed in writing against decline in price (*R., p. 321*).

20. "Recommended that no cement be sold or quoted on specifications other than those of United States Government or of the American Society for Testing Materials." The Report said "The company wishing to make sale should, of course, use its influence to have the specifications made regular" (*Ex. 244, p. 16*).

21. "Recommended that charges for bin tests should be borne by the purchaser." The recommendation was that the "cost" should be borne by the purchaser and against free service (*Ex. 244, p. 16*). The facts as to the charge for this service have been:—

From about 1912 to about June, 1915 (before the Report), the usual charge for this service was 5 or 6 cents a barrel.

Before the Report some of the companies reduced the charge to 3 cents a barrel, and later practically all the rest made a similar reduction, so that the usual charge was 3 cents a barrel until 1920.

In 1920 some of the companies dropped the charge entirely and the others followed (*R.*, p. 320).

22. "Recommended that under no circumstances should cement manufacturers bear the expense of commercial laboratory tests." None of the nineteen defendant companies have ever in their history borne such expense, except four who have continued to do so since the Report (*R.*, p. 320).

23. "Suggested comprehensive rules and regulations with reference to handling sacks." This is an erroneous statement, because the Report discussed the theory of sacks somewhat comprehensively, but suggested nothing in the nature of a rule or regulation except that "only such cloth sacks as are serviceable and can be used again be repurchased", that the cement company's count of inspection should be final and that the cost of returning bags should be borne by the purchaser (*Ex. 244*, p. 17). Five of the nineteen defendant companies have always used the practice recommended before the Report was made. One of the defendant companies adopted that practice when it commenced business in 1917. Thirteen have not, and do not, follow the practice recommended (*R.*, p. 320).

24. "Urged that credit information be interchanged freely among cement companies." That has been done to the extent of the protective credit information contained in the reports of the Cement Manufacturers Protective Association.

2. The Association of Licensed Cement Manufacturers.

In 1906, after extensive litigation concerning a patent granted to Hurry & Seaman, who were the first to burn cement by the use of pulverized coal in place of oil, and had been granted broad claims covering apparatus comprising any means of accomplishing that, an arrangement was made whereby some of the then eastern manufacturers took licenses, paying the owner of the patent \$200,000 a year, and sub-licensed others (*R.*, p. 725). The drawing of the patent is reproduced in the article on Cement in the Encyclopaedia Britannica.

Later on, January 13, 1909, after the decision in *Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co.*, 154 Fed. 359 and like cases, and relying thereon, supplemental licenses were executed making it a condition of the use of the patented apparatus that the product made thereby should not be sold, within certain territory, below a specified minimum price, the licenses not affecting the price of any cement except that made by the use of the patented apparatus (*R.*, pp. 757-8, p. 762, *Ninth*). The licenses containing this condition were terminable by notice January 1, 1911. Although the decisions upon which it was based had not been changed and the patent was still in force and not finally adjudicated, the supplemental licenses were not continued after January, 1911, and the association then ended (*R.*, p. 726).

No inference concerning the intentions of the defendants in forming Cement Manufacturers Protective Association can be drawn from the patent licenses of fifteen years ago, because—

(i) Those licenses being within the monopoly of the patent and not affecting any other cement (*Ex. No. 549, R., pp. 757-8; p. 762, Ninth*), represented a usual method of doing business upheld by the courts at that period (see *Henry v. Dick*, 224 U. S. 1, 86 (1912); *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358; *Indiana Mfg. Co. v. Case Threshing Machine Co.*, 154 Fed. 365; *Goshen Rubber Co. v. Single Tube Tire Co.*, 166 Fed. 431, *R.*, p. 726). The licenses did not apportion territory as stated in the opinion. They merely provided that the minimum price should apply only within limited territory.

(ii) The license agreement of 1909 was terminated voluntarily pursuant to a provision therein, on January 1, 1911 (*R.*, p. 726). If these defendants are to be judged by the disposition of other men years ago, their later disposition to free themselves from any restraint seems a fairer selection.

(iii) While there were fifteen licensees (*R.*, pp. 726, 757) three of them (the American, Catskill, and White-hall Companies), are not defendants, and the management of many of the remaining twelve has changed. The rest of the present Association of nineteen companies were not connected with the patent licenses.

(iv) Since 1911 the unwillingness of the defendants to limit individual opportunity by the slightest restraint has been repeatedly demonstrated: For instance, in 1912, when as a result of withdrawals of the eastern companies from the National Portland Cement Association (*R.*, pp. 194-5) an Eastern Association was abortively started as a substitute, they declined to enter into an

Association of the kind known as the "Eddy Plan" or "Open Price Plan" when presented by its author Mr. Eddy (*R.*, pp. 781, 782, 783). And from December, 1914 to May, 1915, there was a trade war in this section of the industry wherein prices were reduced far below cost, not to get immediate business, but to inflict financial damage which it was thought one of the rivals was not in a position to stand (*R.*, pp. 332-3).

(v) The law has long condemned attaching weight to such past incidents (*Wigmore, §194, and cases cited*). There has been no change in the law for centuries:—

"1694, Holt, L. C. J., in Harrison's Trial, 12 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): 'Hold, Hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away. That ought not to be; that is nothing to the matter'."

3. The Eastern Association.

By resignations and otherwise, most of the eastern production was out of the National Association in 1912 (*R.*, pp. 194-5). In November 1912, the eastern manufacturers met to form an association with a plan following that of the National Association (*Ex. 554, R.*, p. 784). At the second meeting, Mr. Arthur J. Eddy, author of the plan called the "Eddy Plan", "Open Price-Plan" in the petition herein, whose book on "open competition"

had then recently been published, appeared and explained his ideas (*R.*, p. 781). At the next meeting it was unanimously decided not to adopt Mr. Eddy's plan (*R.*, p. 782). At the following meetings there was discussion of what the association should undertake, in employing road engineers, what sort of statistics should be collected, etc., (*R.*, pp. 790-2). At the meeting, February 28, 1913, the members having rejoined the National Association (*R.*, pp. 194-5), the tentative organization was abandoned (*R.*, pp. 777-8).

THE HISTORY, PURPOSES AND RESULTS OF CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION.

The existence of this litigation, and more particularly the criminal case against these companies and many individuals, has tended to give to the Cement Manufacturers Protective Association a factitious importance bearing little relation to the place it occupied in the life and affairs of the members. It was not an artificial plan invented to control this portion of the industry, but the product of a natural evolution, the spontaneous reaction for self-preservation against serious injury from abuses and evils incident to specific job contracts, when presented in most acute form.

The Association was formed to give organized, regulated form and definite limits to these efforts of the manufacturers to protect themselves by exchanging and developing information defining the extent of the obligation of each manufacturer under his specific job contracts. When it was formed, it was decided that it should carry also the limited protective credit service, the statistical service to which these companies had long been accustomed (*R.*, pp. 195, 337) and the taking over from the individual companies of the publication of books of freight rates, so that the same books showing the rates between the same points were published once instead of several times as formerly.

1. The Facts Leading up to the Organization of Cement Manufacturers Protective Association.

In the latter part of 1914 and early in 1915 there was a bitter trade war between the two largest companies in this section of the industry (wherein one reduced his prices far below costs, not to get immediate business but to inflict financial damage which it believed its rival was not in a position to stand, *R.*, p. 332), during which all prices for upwards of three months were reduced below bin cost and far below commercial cost (*R.*, p. 333; *Ex. 675*, *R.*, p. 963). In May, 1915, the war ended and prices promptly rose to their former level by July, 1915 (*R.*, p. 333).

During this cut-throat competition, many specific job contracts had been taken at prices below costs (*R.*, p. 333). In the fall of 1915 the sales managers of sixteen of the defendant corporations met with lists of their outstanding specific job contracts in an effort to define the actual obligations by matching their contracts to reveal duplications and bringing together the facts as to the cement still required for each job so far as known (*Ex. 530*; *R.*, p. 715).

The transactions at this meeting and a succeeding meeting in November, 1915, related only to specific job contracts and were along the general lines subsequently given effect in the specific job contract activities of the Protective Association (*Ex. 530*; *R.*, p. 715).

In November, 1915, a meeting of southern manufacturers (not defendants), attended by representatives of six defendant Lehigh Valley companies, was held in Washington (*Ex. 531*; *R.*, p. 716). This meeting was the

occasion for a sharp definition of the policy of one of the largest companies, that it would not be represented at any meeting with competitors whatsoever unless the matters to be considered were definitely defined and it was conducted under legal advice (*Exs. 532, 534; R., pp. 717, 718*).

Thereupon this spontaneous specific job activity was put in definitely regulated form, and the three other activities relating to credit, statistics of supply and the publication of freight rates, added to it, in a Plan, Constitution and By-Laws, sent to eastern manufacturers shortly before January 6, 1916 (*R., pp. 337-8; Ex. 13, R., p. 353*).

2. The Plan of the Association.

The "Outline of Plan for a Protective Association of Cement Manufacturers" (*Ex. 13, R., p. 353*), sent to the eastern manufacturers of cement with a proposed constitution and by-laws, subsequently adopted at a meeting January 6, 1916, recited the purposes and nature of the proposed Association substantially as follows:

"Conspicuous among the evils from which every manufacturer of Portland Cement has long suffered have been certain notorious abuses arising from what amounts to fraudulent misrepresentation. The most common and flagrant instances are those which have to do with misrepresentation concerning contracts (known as "specific job contract"), competitors' acts, and financial responsibility.

Although these abuses are too well known to require elaboration, it may be desirable to look at an illustration of each, with a view to determining

whether it is practicable in a measure to correct them:

(1) It has become common, for example, in cases of jobs in fact involving the use of, say, a thousand barrels of cement, for purchasers to contract with each of several manufacturers for, say, two thousand barrels of cement to be used on that specific job. This pernicious practice results in purchasers obtaining what, as a practical matter, amounts to an option extending over a long period; and, in the aggregate, such options induced by, and based on misrepresentation, impose on the manufacturer one-sided, uncertain obligations covering a considerable portion of his output, frequently curtailing his business and resulting in loss.

It is apparent that such abuses could not exist if the truth were known. If the manufacturer knew the facts concerning the job, the amount of cement needed, whether his or some other cement was being used thereon, he would obviously be in a position to escape the disastrous consequences of such misrepresentations. The plan hereinunder outlined is designed to make the truth available and thus defeat such misrepresentations and their consequences."

The outline then referred to the common experience of every manufacturer "with statements made to him not only by dealers, but even by his own salesmen" concerning competitors' practices, and said:—

"In the following plan it is not proposed to provide the fullest relief against such misrepresentations, because reports of outstanding or active offers or quotations may be objectionable, but it is proposed to give the manufacturer an opportunity of checking the representations of dealers and

salesmen by including with the information as to specific contracts, the price at which these past transactions have been closed, so that false statements may become less frequent."

Concerning the credit activities, the outline of the plan said:—

"As to that kind of misrepresentations which has to do with credits, the plan explains itself. Here, again, the correction of the evils resulting from the misrepresentation is to be sought in making the truth available."

As to the statistical activities, it said:—

"In addition to the correction of these abuses by meeting misrepresentations with the truth to the extent indicated, the plan contemplates the giving of certain statistical information concerning the past, which has heretofore been available in less convenient form and is included because it may be included without much additional inconvenience to anyone."

As to the freight rate books, it said:—

"The plan further contemplates the compilation and publication of freight rates to relieve each manufacturer of the great burden of keeping track of this necessary information."

This Outline of Plan, with a proposed Constitution and By-laws was submitted by the individual manufacturers to their respective counsel, including eminent leaders of the bar in Philadelphia (*R.*, p. 404) and New York (*R.*, p. 432), who advised that there was no legal objec-

tion to the activities therein outlined as long as the work was kept "within the lines laid down" (*R.*, p. 404).

The plan was also taken to Washington and submitted to Mr. Hurley, then acting as chairman of the Federal Trade Commission (*R.*, p. 288).

The activities of the Association and the way those activities were conducted, were exactly the same from the Fall of 1917 (*R.*, p. 161), when the Association commenced employing engineers to investigate the amount and brands of cement which would be used under specific job contracts. The difference prior to that was only this: In the Fall of 1916, the investigation of the requirements of specific job contracts was accomplished by employing Dodge & Company, a well-known commercial reporting house, to make the investigations at a fixed charge per contract; and for the months prior to the Fall of 1916, the facts as to the requirements were developed only to the extent of bringing together such information as the members themselves had.

The extent and limits of those activities have been recited (*supra*, p. 7 *et seq.*). It remains to make plain the results:—

3. The Results of the Credit Activity.

The only purpose or result of the credit activity was, obviously, to enable a manufacturer to judge somewhat better whether to extend credit or require cash or security.

In the opinion there are quoted some remarks of credit men concerning discounts and rebates (*R.*, p. 1804); and the petition mentions discounts as one of the so-called

"uniformities". But there was no report whatever of terms, discounts, rebates or anything of that nature and no act of that kind by any manufacturer was ever disclosed (*R.*, p. 166). As to all such things, the Association could produce no result whatsoever.

4. The Results of the Specific Job Contract Activity.

The purposes and results of the activities in connection with specific job contracts, were as follows:—

(a) The activities did not tend to diminish the number of specific job contracts. On June 1, 1920, 23,606,000 barrels of cement were called for on the face of such specific job contracts then in effect, the largest amount in the history of the industry (*R.*, p. 166).

(b) The activities did not, and in their nature could not, diminish the obligation of any manufacturer to deliver cement under specific job contracts; and there is no suggestion in the evidence that any manufacturer has ever failed fully to perform his obligation under any contract.

(c) Upon learning the facts concerning the extent of his obligations under such contracts, the individual manufacturer in fact cancelled the amount which would not be required in the work, and so was not called for by the contract, in approximately two-thirds of the cases, and did not act on the facts in the other third.

Thus, in 1920, of 1392 contracts investigated and found to be padded or spurious to the extent of 3,552,865 barrels, 978 were wholly or partially cancelled to the extent of 2,104,653 barrels, and the remaining 414 contracts,

involving 1,448,212 barrels not required for the job or covered by the contract, were not cancelled in whole or in part (*R.*, pp. 350-1).

The average time which elapsed between the report of the investigation and the date of cancellation was 86 days per contract (indicating the freedom of the manufacturer to do as he chose and the independence and care with which he proceeded); and since cancellations were reported so that these facts were known to all the members, it is plain that there was no agreement (*R.*, p. 351).

(d) The direct purpose and result of the specific job contract activities of the Association was to inform the manufacturer as to the extent of his obligation under his own specific job contracts, and to enable him to protect himself against being defrauded by the unscrupulous obtaining cement from him at a price below that at which he was willing to sell (and often below his advanced costs), by the false representation that the cement was not for resale but for use in a specific job to which he had contracted to supply the cement at a lower price.

The secondary effects of enabling the manufacturer to protect himself against this fraud were precisely those following protection against having his cement stolen by any other means—on his finances, on future prices to make up for the loss, in the market where the stolen goods might be offered, and in law, policy and morals.

(e) An indirect purpose and result was a tendency to make the whole industry more honest and efficient, by diminishing the advantage which the dishonest dealer had had over the honest dealer, by enabling the manufacturer to conduct his business with knowledge of his own obligations, and by discouraging fraud—in brief, to

check an extreme example of a recognized economic abuse working great harm and produce a recognized economic benefit (*R.*, pp. 298-9).

(f) The specific job contract activity did not, and could not, lessen competition. Any cement disclosed as not required for a specific job or covered by the obligation of a specific job contract and cancelled by the manufacturer, simply became cement which the manufacturer knew was unsold and available for sale by him in competition with other manufacturers.

(g) In the specific job activities, it does not "appear that the defendants have done more than was fairly justified by reasonable self-protection" (*212 Fed. 476*).

The Errors in the Opinion Below Concerning the Purpose of the Specific Job Contract Activity.

(1) The opinion finds "of course, if a company wished to recognize an agreement with a contractor or person who had expected to supply cement for a specific job and who did not get the work but was willing to take the cement notwithstanding, it might do so" (*R.*, p. 1805).

While this freedom of the manufacturer is plain, these and other statements in the opinion concerning the matter of specific job contracts indicate misunderstanding:—

When a manufacturer supplied cement to a person "who did not get the work but was willing to take the cement notwithstanding", the manufacturer was not "recognizing an agreement". The agreement was (as the Court pointed out elsewhere *R.*, p. 1801) to supply the cement to a specific work. It could not be recognized or performed unless the other party did get the work.

What any manufacturer does when he gives cement to such a person as the Court describes, is simply to deliver to him a certain amount of cement at the price named in the contract. Any company might deliver any quantity of cement at any price without that being disclosed in any way through the Association, because nothing concerning any sale, except the facts from specific job contracts, were in any way reported or disclosed.

On such misunderstandings, the Court below wholly ignored the real purpose and function of the specific job activity and concluded that "one of the prime reasons" for the specific job activity "was to exert a moral compulsion upon a company which was inclined to recognize a contract, such as I have just referred to, and to make assurances doubly sure that over any future time there would be no 'free' cement" (*R., p. 1806*). It is to be observed:—

(i) If any manufacturer wished to ship anyone the amount of cement named in a specific job contract, or more or less, at the price named therein or a higher or lower price, he could freely do so without disclosing the sale in any manner through this Association.

It seems, we submit, inconceivable that men intelligent enough to be entrusted with the conduct of large businesses, could have thought they were exerting "a moral compulsion" as to anything connected with sales when they left everything connected with 70 per cent of the sales wholly undisclosed and arranged for learning only what part of specific job contracts was "duplication" or "padding".

(ii) What the Court refers to as "free" cement is cement obtained by fraud. The purpose of this activity

was to enable the manufacturer to know the extent of his contract obligations. An incident of that was that he could protect himself against being cheated—against having his cement taken by false pretense.

(2) The opinion also mentions the fact that “upon one occasion cancellations amounted to no more than one-fourth of a barrel of cement” as suggesting that “one of the prime reasons” for the specific job activity was “moral compulsion” against “recognizing” non-performable contracts (*R.*, pp. 1805-6).

But the reporting of the fact that a balance of one-fourth of a barrel—the difference between the contract estimate and amount delivered to a specific job—was no longer an obligation, means simply that these defendants, like all large business organizations, necessarily operate by rule; and once an order is issued, a clerk carries it out without thinking, or authority to think, whether a particular balance is important or unimportant. Unless the cancellation of the undelivered balance of that particular order had been reported, it would, of course, have been carried on the report of uncompleted specific job contracts (*R.*, p. 352). It adds nothing to the fact that the Association engaged in reporting the particular facts needed to disclose duplications of outstanding specific job contracts.

The Reasons for Employing this Method for Protection.

To leave nothing unexplained, we mention some of the reasons why protection assumed this form, instead of suit which the Government has suggested as more appropriate:—

(a) If the manufacturer, having made a contract for "the full Portland Cement requirements of the following described work" (*Ex. 571, R. p. 821*), pursuant to the common understanding that unless the dealer (or his customer) should be awarded the contract to construct the work he would not have to take the cement, brought suit against a dealer not getting the work, who could not possibly perform by taking "the full Portland cement requirements of the following described work", under a contract expressly providing that the cement should not be used for any other purpose, it is doubtful whether he would succeed, before a Court and jury, in accomplishing more than making himself ridiculous.

(b) Suit, in view of the long-established general understanding, would certainly cause the manufacturer to lose more in custom than he could possibly recover in damages, even if he succeeded and the dealer was financially able to respond. Every competitor would promptly circulate information concerning the suit among the manufacturer's dealer customers; and he might as well shut down, because he cannot operate without the dealers' assistance.

(c) Suit would not define the manufacturer's obligations in advance. It would not inform him which of his specific job contracts were duplications or to what extent any was padded. It would not free his cement for sale. If it were possible, and the competition were suppressed long enough, to let repeated suits narrow the contracts to those with the contractor (or his dealer representative) who would actually construct the job and use the cement for it, that would merely make it more difficult for contractors to bid freely for the construction work.

(d) And even when that had been all accomplished, the surplus padding would still present a vast amount of uncertain obligations, tending to hold cement from the market and prevent efficient manufacturing operation, and constituting means which would be used by the unscrupulous to defraud the manufacturer and injure the honest dealer.

The Reasons for Collective Action.

The evils connected with specific job contracts could not be met individually :—

(1) The reporting and matching of the contracts was essential. No manufacturer could learn of his duplications without knowing what contracts the others had made.

(2) The expense of individual investigation made it impossible. To send a qualified man to, say, Maine, to look into a single contract and then to, say, western New York and then to Delaware, and so on, would mean such a consumption of his time and such expenses that the cost of investigating would be prohibitive. On the other hand, when the jobs in a particular neighborhood could be grouped and a man sent there to investigate the collection, the cost of each was immensely reduced.

(3) The evils incident to these specific job contracts were evils affecting the industry as an industry. They meant that the honest dealer was at a disadvantage compared with the unscrupulous dealer and put a premium on dishonesty. They tended to make both the manufacture and marketing of cement, until it reached the public,

a blind, dishonest gamble, with the reward depending on comparative degrees of luck and cheating, instead of what an industry with innumerable people depending on it, should be. The eradication of them by developing the truth went far beyond the interest of any individual company.

It was not practicable to investigate all specific job contracts. In the year 1920, when the failure of transportation made a temporary shortage of cement in the markets, the maximum of 54 per cent. of the specific job contracts were investigated (*D-9, R., p. 1048*). It is to be noted that more contracts were investigated when market prices were very high (and so manufacturers would not naturally want to avoid real contracts), in the face of the fact that prices would inevitably fall, than were investigated at any other time. When to that is added the fact that all the manufacturers' written specific job contracts then provided that if the price went down the cement would be delivered at the market price, it is plain that the only purpose of the investigations were to develop the truth as to what cement was free and what covered by obligations.

5. The Results of the Statistical Activities.

In this industry statistics of production and shipments have been common for many years (*R., pp. 195, 337*). The defendants at least, could not have expected them to exert restraint, for with such statistics from the national Portland Cement Association, they had recently been through a bitter cut-throat war. And the evidence proved that the statistical information of Cement Man-

ufacturers Protective Association did not, during six years, exert the slightest restraint:—

(a) Each manufacturer freely exercised his own independent judgment and will, the nineteen producing, selling and profiting diversely and variously and in ways comparable to no conceivable common standard or judgment, throughout the six years (*infra*, pp. 120, 127, 129).

(b) There is much evidence that the individual defendants used the reports to increase their efforts to get ahead of their competitors; and no evidence of any other effect on competition. Illustrations of how these reports in fact stimulated the individual manufacturers to increased efforts to get business away from each other, admit of no speculation concerning the result in fact produced (*Exs. D-176, R., p. 1112; D-29, R., p. 1056; D-30, R., p. 1056; D-450, R., p. 1468; D-31, R., p. 1056; D-32, R., p. 1056; D-33, R., p. 1056; D-34, R., p. 1056; D-182, R., p. 1115; D-183, R., p. 1115; D-184, R., p. 1115; D-185, R., p. 1116; D-178, R., p. 1113; D-180, R., p. 1114; D-481, R., p. 1491; D-395, R., p. 1439; D-225, R., p. 1132; R., p. 334*).

(c) The suggestion of the petition that "comprehensive statistical data" (*R., p. 5*) necessarily restrains trade seems to lose sight of important distinctions. The disclosure of all the "minutest details" (257 U. S. 410), "all the intimate details" (262 U. S. 389) of terms, conditions and special arrangements between a manufacturer and each purchaser is "comprehensive" but only remotely "statistical data". The mere comprehensiveness of a particular kind of information concerning the existing supply is a merit, because:—

(i) Summarized or incomplete data—less than the whole truth—is apt to be misleading. For instance, here a total of the existing supply might mean either a great quantity on hand or shortage in Maryland and Virginia or northern New York, regions which, by reason of freight, do not serve the same markets.

(ii) Any mere summarization involves some risk of collective guidance by the way the figures are handled, which is totally absent where the information is merely “the truth, the whole truth, and nothing but the truth”.

(d) There is no room for the suggestion that statistics of production, stocks, shipment and commitments necessarily restrain trade. Such information is recognized by all authorities as essential to effective competition and a necessary part of industry as it is carried on today—with large scale production, very wide markets, large fixed investment, narrow margins of profit, great numbers of employees dependent upon the prosperity and steady operation of particular enterprises for their livelihood and countless others indirectly dependent thereon, and risks even more than proportionately multiplied.

Professor Adams of Yale testified that statistical information is “essential to effective competition, and in general it is highly beneficial” (*R.*, p. 299).

Jevons, the great economist, says that knowledge of the facts always make competition more keen and perfect and that if business men will not voluntarily give each other the essential statistical information, they ought to be compelled to do so by law.

“It is the very essence of trade to have wide and constant information. A market then, is the-

oretically perfect only when all traders have perfect knowledge of the conditions of supply and demand.

* * * * *

So essential is a knowledge of the real state of supply and demand to the smooth procedure of trade and the real good of the community, that I conceive it would be quite legitimate to compel the publication of any requisite statistics." (Jevons, *The Theory of Political Economy*, 3rd ed. 1888, pp. 870-88.)

Similarly the report on "*Business Cycles and Unemployment*" prepared by President Harding's Conference on Unemployment, urges business men to co-operate in the exchange of statistics as a matter of social duty, saying (p. 11) :

"The greater part of the material presented by the Department of Commerce is based upon data furnished voluntarily either by industries or by trade associations. One of the difficulties in making such returns effective for their purpose is the refusal of a few firms to contribute to the common pool through either of these channels. Such refusal destroys the possibility of common knowledge in certain industries and seriously undermines the ability of business men in such industries to form proper judgments. It also decreases the area of knowledge of the currents of business as a whole necessary to each separate business.

The vast majority of business men have given enlightened cooperation in these efforts. But the minority who refuse to cooperate are doing injury to the business fabric as a whole."

Mr. Hoover, who as Secretary of Commerce of the United States, may be expected to know about such matters, said in his speech before the Trade Association Conference April 12, 1922:

"Statistical information as to productivity and national stocks is needed not alone by the man in a particular industry but the same information is needed by men in other industries and it is needed by every agency of the Government. A study of the trend of production and consumption does not imply restraint of trade. If it does, then the whole statistical basis of commerce that fills one-third of our newspaper space would need to be abolished. If we abolished it we would be bankrupt in ten years."

And in his address before the National Distribution Conference January 14, 1925, he emphasized the need of such information, saying:

"It is a truism to say that no individual business enterprise could succeed or be conducted without waste if it does not know accurately its stocks, the volume of output or sales, the rate of stock turnover, or its orders, or the prices, assets and liabilities and the relation of these to previous periods. Neither can the business of a trade, as a whole, or the nation itself, function efficiently unless it knows these very things.

The fundamental of every economic action is to first determine the fact. Moreover, as business is a moving thing, the facts must be recurrent in short statistics."

And, after exceptional experience, he then said:—

“The government can do much in collection and distribution of statistical information. Indeed the Department of Commerce has greatly improved and expanded these services in the last three years. No other nation provides so complete a service today. It needs still greater improvement. However, a considerable part of our statistical service can be better provided by the different trades themselves than by the government.”

6. The Results of the Activity Concerning Freight Rates.

The results here seem apparent from the facts:—

The publication of the books collectively simply took the place of previous separate publications by individual manufacturers who published books of the same form and contents,—with increased accuracy resulting from more thorough check of the rates (*R.*, p. 150).

The collective publication resulted in a saving of much money annually, since individual freight departments each costing about \$30,000. a year (*R.*, p. 412) could be cut down.

The rates given in the books were as accurate as it was possible to make them, and no inaccuracy of any consequence or significance has been found.

The treatment of fractions resulting from changing tons to barrels, was in accordance with the regulations of the Interstate Commerce Commission (*R.*, p. 245). The changes which had to be made in the Alpha books, by reason of changes in rates since they were printed—the other inaccuracy suggested by the Government—were made before the books were sent out or used (*R.*, p. 444).

Any inaccuracy in the books was calculated to injure the manufacturer, because if he quoted on an erroneous rate, he would have to pay the difference. Accurate rates in every other respect would have precisely the same effect as inaccurate rates.

The books did not purport to give rates from any point which no one had ever used as a basing point—either rates from the scattered small mills or individual local rates from a particular mill on the edge of the Lehigh district to a nearby point. They gave the rates from every point which anyone had in fact used as a basing point, adding during the operation of the Association Fordwick, when the Lehigh Company commenced to base on its mill at Fordwick. Those were the only rates of any general importance to all and the only rates which the individual manufacturer had formerly published, in marketing his product (*supra, pp. 63-71*).

The purpose and result of the publication of these books was:—

(1) Giving effect to the purposes of the law governing freight rates, that all rates should be both equal to those similarly situated and known.

(2) The saving of much economic waste otherwise involved in the separate figuring of the same rates by traffic experts employed by each company.

(3) The securing of somewhat greater accuracy by reason of the additional checking and rectification of errors by combined experience.

(4) The collective publication had no other effect. All the other effects mentioned in this connection are obviously effects of using the basing points or of the

freight rates themselves, and equally present or absent when these same freight rates are published many times by individual manufacturers or once collectively.

The Error in the Opinion Below Concerning the Freight Rate Books.

The Court found that "the freight books standing alone and in so far as they merely record a compilation of freight rates, are harmless" (*R.*, p. 1802); and that "their vice, if such it be, resides in the fact that there is a concert of action upon the part of the defendants in so using them that all prices quoted are for delivery at the point required by the purchaser" (*R.*, p. 1802).

The Court, apparently using the term "concert of action" in the sense explained in *United States v. Piowitzky*, (251 Fed. 375-377), then finds that there is no agreement concerning such practice, saying "it is said that this method of marketing cement is a trade custom which came into being before the formation of the Association; that it results from the independent and uncontrolled action of each manufacturer and is in no way to be attributed to agreement or to any activity of the Association. Very probably there is no agreement now in force by which such practice is to be followed" (*R.*, p. 1802).

But the Court then says that "the custom, however, was at one time the subject of an agreement", the patent licenses of 1909 and 1910. The principal mistakes in this are:

- (i) This method of selling at delivered prices computed from the points of large production, was not created by the patent licenses (*supra*, p. 60).

(ii) The same degree of sharp competition could not exist without it. If each manufacturer based his prices only on his own mill, he would be excluded from selling in markets freightwise nearer other mills (*supra*, p. 67).

(iii) The mere collective publication of rates could not control conduct in selling f. o. b. delivery point or f. o. b. mill; and if all prices were based on a manufacturer's own mill, the freight rates would still be required (*R.*, pp. 149-150, 152).

7. The Errors in the Opinion Below Concerning the Purpose and Effect of the Bag Report.

The Court below seems to have attached importance to the bag report, saying "in my judgment it was something more than a desire for statistics, as such, that was responsible for the Association undertaking to find out from the several companies whether returned bags were first cleaned and then counted or were first counted and then cleaned. * * * A disclosure of what was being done in making allowances for bags, while it could be used for competition was, I think, more likely intended to impose a restraint upon any company that was shading prices" (*R.*, p. 1804).

This seems based on misunderstanding:—

(i) The report did not show "what was being done in making allowances for bags" in any way that could disclose the "shading" of any price. The only figures were the totals of bags received and found unfit for use during the past quarter. There was no disclosure of what was done with respect to bags returned by any particular

purchaser or in connection with any particular transaction (*Exs. 85, 66, R.*, p. 371). There was no disclosure of the charge or allowance for bags (*R.*, p. 166). There was no disclosure of any special allowances, commissions, rebates or arrangements with purchasers in connection with any sale. Nothing whatever was disclosed concerning 70 per cent. of the sales (*supra*, pp. 11, 15).

(ii) During the discussions leading up to the decision to have this bag report, sundry remarks were made by individuals. It was pointed out that giving credit for worthless bags amounted to a rebate. Also that the form of report would not correct that, but "if your company were allowing 10 per cent. and one of the other companies was allowing 3 per cent., you would look into your bag question very carefully to see the condition that your bags were shipped out in and packed up, if necessary. * * * That is where I think it would probably be of benefit to us to have this information" (*R.*, p. 471).

(iii) The report showed percentages of bags unfit for use varying from $\frac{1}{2}$ per cent. to $4\frac{1}{2}$ per cent., one company rejecting nine times as many bags as another (*R.*, p. 484). It was to see whether the better results could be attributed to whether the bags were counted before or after cleaning the questionnaire was sent out. The interest attaching to this and the bag report was this:

Expensive bags are necessitated by the extreme fineness and weight of cement and the strains from piling and jolting incident to its transportation. They are merely an instrument of delivery, taken back at the price advanced for them. During the five years, 1917-1921, the losses of these manufacturers in bags amounted in all to

\$7,229,698.82 (*Ex. D-274, R., p. 1293*). Any information enabling a manufacturer to judge or better the efficiency of his bag department was of legitimate, helpful interest; and the quarterly diverse percentages of losses could serve no other purpose.

8. The Errors in the Court Below Concerning Trade Practices.

Much of the reasoning of the Court below, with respect, seems to proceed upon confusing actual purposes in forming this Association with desires of some or all manufacturers, to which the activities of the Association were not in any way related.

For instance, an individual on one occasion said in a discussion relating to whether the totals of bags returned and found unfit for use should be reported, that allowing credit for worthless bags was equivalent to a secret rebate and, "we want our practice to be the same as the others". Any responsible manufacturer of anything, despises secret rebates (as distinguished from fair, honest competition) and desires freedom from such indefensible practices, unless others resort to them. But that desire has nothing to do with this Association, under which everyone might give secret rebates, directly or in many disguises, including allowing any customer credit for worthless bags, without disclosure.

Similarly, the Court found that when the Association was formed, the manufacturers were pursuing ten customary trade practices of the industry which have been the subject of comment by the Government (*R., p. 1800*). But it then suggested that since "some of the foregoing prac-

tices mean nothing more than that the elements entering into a quoted market price have been separately listed" and "each company had a vivid recollection of a ruinous price war that had been waged a year or so before. * * * The time was ripe for an association wherein the danger of competition as to any of the foregoing particulars would be reduced to a minimum" (*R.*, p. 1800-1). This reasoning, with respect, overlooks the fact that the practices were the same during the ruinous price war and two more controlling facts:—

(a) The elements "entering into a quoted market price"—the charge and credit, or deposit, for bags, and discounts—have not been reported or disclosed or affected by the Association (*R.*, p. 166); and

(b) Nothing whatever was reported or disclosed concerning the current business and sales at wholesale to dealers constituting 70 per cent. or more of the manufacturer's business and the portion thereof to which a manufacturer needing money or seeking to capture a dealer's custom, would naturally resort.

The same error of failing to note that the Association did not report the practices or departures therefrom, seems to invalidate the importance the Court attached to the similarity between the practices observed by a number of the defendant corporations "under the license agreement and those now generally prevailing in the industry".

The Court found that "under the present Association there is no method provided for disciplining and penalizing members for a departure from the foregoing practices" (*R.*, p. 1803)—to which should be added "or finding out whether or not they are acting in accordance

with them". The Court also found "neither is there now any compact that cement shall not be sold below a specified price" (*R.*, p. 1803). But it reasoned that the existence of the customary practices during the license and now, is significant.

Those granting licenses under the patent on the condition and limitation that the product should not be sold below a minimum price, simply took the common methods and mechanics of sale and price figuring as they found them and guarded against dodging the minimum price. Those methods were the same during cut-throat competition. It was the price limitation alone which constituted restraint.

9. The Error in the Opinion Below Concerning Keeping the Reports Confidential.

After the Association had commenced operating, it was found that some members were using the credit reports to make those reported feel offended with members reporting them and on that ground capture their custom (*R.*, p. 441) and that the statistical reports and specific job contract reports were being taken by salesmen to those who had closed contracts with misleading arguments to induce them to transfer the business to the company whose salesman thus misused the reports (*R.*, pp. 555, 561).

These misuses of the reports promised to make the continuance of the Association services impossible, because a manufacturer could not report an over-due account if a competitor was to use that to make the debtor feel offended and thus capture his business; or his commitments, if competitors were to take them to purchasers

(totally unqualified to understand them, as, for instance, to guess what part of the commitments were "duplications" or "padding"), with false arguments that the business should be transferred; or his contracts, if competitors were to use them as the basis of efforts to induce breaches.

Without any thought of secrecy (as evidenced by the fact that everything went regularly to the Trade Commission (*R.*, p. 162), in the hope of stopping the unfair use of the reports, a letter was sent suggesting that each company confine the use of the reports within its own membership (*R.*, pp. 1128, 1008). Even that did not operate to prevent salesmen pursuing the same unfair practices; and a letter was sent to the principal executive of each company, as distinguished from those attending the meetings, calling attention to the abuses and expressing the opinion that "this information should be used by executives to check up their operations and not given out to employees for such uses as they may choose to make of it" (*R.*, p. 1019). Even that did not stop the unfair use of the reports, but no further action was taken.

When competitive activities are carried to such unfair extremes, it seems impossible to suggest that competition has been suppressed. The Court below overlooked these facts and attributed to the efforts to prevent unfair use by salesmen, theoretical considerations of inequality and unfairness for want of publication. Such considerations, we submit, have no application here:—

(1) The particular reports here did not comprise any information which could interest a dealer or purchaser

or affect his course. Unlike the reports in, for instance, the Linseed Oil case, the reports here contained no active or outstanding price or terms or discounts or market estimates or the like. Buyers here want only offerings.

(2) It was obviously a physical impossibility, or at least absurdity, to keep all dealers advised as to the facts concerning specific job contracts needed to detect duplications. If every report was not to be published, where should the line be drawn? If at information which might affect a dealer's course, then no report justified publication, because these reports did not contain matter which could affect any dealer's course.

(3) The matter is not of general public interest and any publication could be secured only by buying advertising space.

(4) No one had, or has, any objection to publishing the statistics of existing supply (*R.*, p. 338).

(5) Publication does not seem matter of law under this statute, because this statute deals only with the surrender of independence to the collective will. Unfairness of any practice seems to belong under the Trade Commission Act of September 26, 1914, 38 Stat. 717.

Throughout the existence of Cement Manufacturers Protective Association, competition was unrestrained, undiminished and exceptionally vigorous.

This was proved by a large amount of direct evidence without anything to the contrary (*R.*, p. 308, p. 151, p. 174, p. 177, p. 178, p. 185, p. 189, p. 190, p. 192, p. 224, p. 1055, pp. 1056-68, pp. 1074-8, pp. 1080-2, pp. 1107-1122, pp. 1130-44, pp. 1430-1472, pp. 1477-1508, pp. 1649-1664, pp. 1783-1797).

It was proved also by the following items:—

(1) The well-defined market price evidences the acuteness of the competition.

Where as here substantial uniformity of price exists without agreement (*supra*, p. 50), the competition must be acute and vigorous. That is the most desirable kind of price, because it means that everyone is getting the benefit of the low competitive price (*R.*, p. 296).

The fact that Portland cement has advanced in price less than almost any other commodity (*D.* 134, *R.*, p. 1088; *opinion below*, *R.*, p. 1808) evidences the force of the competition.

(2) The losses on the incidents of the market price evidence the sharpness of the competition.

The market price which the purchaser pays is the price of the cement with some incidents, namely, (a) the charge and allowance, or deposit, for bags, (b) the trade discount or dealer differential, (c) the cash discount and (d) the freight.

It is impossible to disguise or avoid the sharpness of the competition in the price of the cement by varying the

items of bags or discounts, because the purchasers being professional buyers, would penetrate any such disguise and figure what the cement would cost them. The same causes which compelled a well-defined market price, necessarily operated on the items entering into that price (*R.*, p. 298). The facts as to each, evidence in greater or less degree the power of the competition compelling results directly opposed to the desires of the manufacturers and inconsistent with collective control, as follows:—

(a) Bags are merely an instrument of delivery, taken back at the price advanced for them. Collective control would adjust the amount charged and allowed to the cost of the bags. Only the force of the competition can account for the large losses of the manufacturers in this item:—

1917, Loss	\$481,120.85
1918 "	640,659.13
1919 "	774,837.62
1920 "	2,157,952.64
1921 "	3,175,128.58
<hr/>	
Total "	\$7,229,698.82

(Ex. D-274, *R.*, p. 1293)

(b) The trade discount or dealer differential, while of less significance, has also gone against the manufacturer, the amount allowed the dealer being generally 5 cents a barrel prior to 1916, and then becoming generally 10 cents a barrel (*R.*, p. 320).

(c) The cash discount has always been uniform in this, and generally in each, industry (*R.*, pp. 188, 189, 221, 222, 223, 656-60). It is of little significance, but it also has been going against the manufacturers generally, from 1 cent a barrel to 2 cents a barrel to 5 cents a barrel

to 10 cents a barrel, for cash within ten days (*R.*, p. 317).

And, as to the other incident of the market price, to all points freightwise nearer competitors' mills, the manufacturer has been forced by the competition to absorb, or deduct from the price he realizes; the amount of his freight disadvantage.

(3) Production by each defendant company during the six years showed complete independence of judgment and action.

With the figures in evidence, if any collective guidance, distribution, allotment, or pro rating, had existed, the Government's burden of proof could be discharged to a mathematical certainty. But the figures in fact demonstrate the complete absence of collective control of production with the same certainty:—

The figures are presented graphically in D-367 (*R.*, p. 1399), showing the amount produced by each company each year from 1915 to 1921, by a black line extending up into the scale of millions of barrels, a distance equivalent to the actual production, the lines for each of the six years being placed side by side over the name of the manufacturer whose production each line represents, the figures being taken from Government's Exs. 373A and 374. Thus, Allentown in 1915 produced 864,000 barrels, dropped in 1916 to 808,000 barrels, in 1917 to 739,000 barrels, etc. (*Ex. 373A, R.*, p. 706). Under any conceivable distribution or control, the skyline of each company in the chart D-367 would be the same as that of the others. The more carefully the chart D-367 is examined, the more plainly the diversity and individual independence in production appears:—

Disregarding the Governmental curtailment in 1918, the production of some of the defendant companies (e. g., Allentown, Glens Falls) has shown actual decrease each year throughout the six years; the production of others (e. g., Edison, Security) has shown increase each year throughout the six years; others (e. g., Pennsylvania, Penn-Allen) have produced approximately the same amount each year throughout the six years; others (e. g., Alpha, Lehigh) have been up one year, down the next, and so on, ending after six years below the production with which they started; and others (e. g., Atlas, Bath) have similarly varied from year to year, ending well above the production with which they started. These figures take no account of conditions in the market, which would, of course, emphasize the differences, because lower individual production in a year when business is generally good and higher individual production in a year when business is generally bad, emphasize the extent to which the individual courses depart from each other and the complete negation of any conceivable collective control.

Some continuous increases, some continuous decreases, some increases one year or two followed by decreases for a year or two with final gain, and some like variations with final loss,—cannot be reconciled with distribution on any imaginable basis. But to indicate the extent of the individual departures:—

The percentage of the total production, which each defendant manufacturer produced, is perhaps even more striking. Exhibits D-369 A to D-369 H (*R.*, p. 1405), compare the proportion of the total production which each company produced in 1916 with its production during the succeeding years while the Association was in

existence. As compared with its proportion of the total production in 1916, Allentown decreased 10 per cent. in 1917, 39½ per cent. in 1918, 20 per cent. in 1919 and 33 8/10 per cent. in 1920. Alpha increased its percentage slightly in 1917 over 1916, but in 1918 fell off 9 per cent., and in 1919 fell off 20 per cent., and in 1921 fell off 4 per cent. Atlas increased 3.9 per cent. in 1917, increased 9.7 per cent. in 1918, increased 8.6 per cent. in 1919, and increased 11.2 per cent. in 1920. The figures of the other companies are similarly irreconcilable with any imaginable plan or joint control of production.

In the following table are brought together for convenience, the figures showing how much the actual business done by each company each year (shipments) fell below or exceeded the amount of business it would have done if the business had been allotted or pro rated according to relative capacity, the figures being taken from Government's Exhibits 382, 388 and Defendant's Exhibits D-370 A to E, and the testimony of Mr. Fernsler (*R.*, pp. 706, 1413, 275). If the business had followed an allotment according to relative capacity, each figure would, of course, be a zero (*R.*, p. 275). The figures are:

	1916	1917	1918	1919	1920
Allentown	+32.07	+18.3	-10.8	+15.5	- 2.5
Alpha	-13.9	-14.8	-23.4	-32.7	-12.1
Atlas	-10.4	- 8.2	-11.9	- 5.6	- 1.3
Bath	- 8.5	- 4.4	-10.3	+45.2	+73.0
Coplay	+16.7	- 6.9	- 1.1	-12.7	+ 1.0
Dexter	+32.0	+26.9	+46.5	+51.5	+28.8
Edison	-39.5	+ 4.4	+15.6	+26.8	+11.0
Giant	-30.0	-35.8	-35.4	-31.6	-39.4
Glens Falls	+38.5	+25.4	+60.2	+16.1	+17.1
Hercules	No capacity figures furnished Association				
Knickerbocker	-10.3	-29.3	- 3.6	-15.9	+ 5.9
Lawrence	+24.7	+31.6	+40.3	+27.5	+62.8
Lehigh	+19.6	+12.8	+14.3	+16.9	-19.3
Nazareth	+32.8	+19.6	+22.9	+ 1.6	+34.7
Penn-Allen	+50.0	+36.9	+31.5	+45.2	+33.3
Pennsylvania	+19.4	+27.4	+36.7	+24.4	+29.2
Phoenix	+11.3	+13.1	Closed	Closed	+29.9
Security	- 0.8	-12.5	+19.1	+18.7	+18.6
Vulcanite	+23.8	- 3.9	- 1.7	- 7.1	+ 5.9

Since the only question here is collective control, general production is less important than relative individual productions. But the activities of the defendant corporations to increase individual low-cost production and the consequent gradual ruin of high cost capacity, emphasize the rigor, not to say cruelty, of the competition between them.

Permanent low cost in cement (as distinguished from relatively fluctuating costs) results in some degree from improved machinery and equipment, in a few cases (Dexter, Nazareth and Pennsylvania, *R.*, pp. 309, 341, 343, 345) from exceptional raw material, but chiefly from freight advantage to the markets.

The expenditures of these defendants individually to increase low cost capacity by the introduction of improvements in machinery and equipment, are continuous. 870,000 barrels increased capacity were thus added by the defendants in 1919 and 1920 (*R.*, pp. 236, 309, Ex. 387; *R.*, p. 706). The Hercules Company in 1917 commenced to operate a complete new plant in the Lehigh Valley (*R.*, p. 184); the Phoenix Company after losing money each year (*infra*, p. 132) completely rebuilt its plant in 1918-19 (*R.*, p. 1310, Exs. 374, 375 A, 377, 382); the Edison Company has rebuilt (*R.*, p. 277); expenditures for improvements decreasing costs by others are constant (*R.*, pp. 3583, 3590). Much of the earnings has been put back into improving the plants and appears in increased "invested capital."

But the most radical kind of permanent low cost is in acquiring freight advantage to markets. The Atlas Company, notwithstanding large surplus paper capacity in the Lehigh Valley, has constructed its large mill at

Hudson to get this advantage over the others (*R.*, p. 332); the Alpha Company, with surplus paper high cost capacity in the Valley, has added its mill at Alsen (*D-275B, R.*, p. 1295); the Lehigh Company, with surplus paper high cost capacity, has added its mill at Fordwick (*D-275M, R.*, p. 1306). Such expenditures are totally inconsistent with collective control.

And the result is the gradual elimination of the high cost investments under the inexorable pressure of the competition, thus:

Only ten years ago the then twenty-seven eastern cement companies were invited to form the abortive Eastern Association (*Ex. 554, R.*, p. 778). Of these twenty-seven, two, the Wayland and Northampton Companies, were just disappearing, through discontinuing business and bankruptcy at that time (*ib.* 791). Another, the American Company, went into bankruptcy (*R.*, p. 149) and later was reorganized into the Giant Company. Five of the others have been financially reorganized, Knickerbocker, Nazareth and Phoenix in 1918, Allentown in 1919, and Edison in 1921 (*R.*, pp. 1252, 1255, 1258, 1242, 1248). Three of the others, Cayuga Lake, Norfolk and Virginia, have been taken over by larger, stronger companies (*Exs. 373A, 374, 375A, 378, 379, R.*, p. 706). Thus, in ten years the finances of eleven out of the twenty-seven have received attention of some unusual kind. And some of the defendants have lost money each year (*infra*, p. 132).

This individual increase of lower cost production, reflected in this history of ten years, has meant that particular mills have been unable to operate, although being owned by companies which have increased their low cost

production, they have not occasioned financial reorganization, and still stand with paper capacity. Thus, the Atlas Company constructed its mill at Hudson, although its paper capacity in the Lehigh Valley was then far in excess of any amount it has yet produced, even with its remarkable increases, both absolute and in its percentage of the total amount consumed (*Exs. 386, 387, 373 A, 374; R., p. 706, p. 332*). Such over-building to get lower costs and advantage over competitors, even at the cost of rendering some of one's own equipment practically obsolete, is striking proof of the vigor and rigor of the competition.

Two opposite abstract theories of production policy are mentioned in the record. Gen. Goethals (*R., p. 286*), Mr. Hurley (*R., p. 287*) and Mr. Morron in a speech at the annual dinner of the National Association in 1913 (*Ex. 516, R., p. 708*) expressed the opinion that sound business requires a producer to see a demand for his product before he makes it. Other defendant corporations, as Dexter, Pennsylvania and Nazareth, turn out every barrel their plants are capable of producing right through the year (*R., pp. 341-346*) and take their chances on selling it. Whichever course is followed, production is inevitably controlled by consumption, because unsold product necessarily stops over-production as effectually as foresight.

Production of the defendant corporations has in fact exceeded consumption to such an extent that at the end of each season, about 10 per cent. of the product (*Ex. 671-3, R., p. 963*), which can be stored and kept only at con-

siderable risk and expense, has been left on their hands. On December 31, 1918, the defendants had on hand 847,000 barrels of clinker and 3,175,000 barrels of ground cement (*Ex. 30, R., p. 366*) ; at the close of the next year, December 31, 1919, they had on hand 503,000 barrels of clinker and 2,066,000 barrels of cement (*Ex. 41, R., p. 366*) ; and at the close of the next year, December 31, 1920, they had left on hand 363,000 barrels of clinker and 2,496,000 barrels of cement (*Ex. 53, R., p. 366*).

The defendants have also left nothing undone to increase consumption and so production. Through the National Association, they spent large sums annually in educational work devoted to increasing the use of cement (*R., p. 196*), and in addition thereto their individual expenditures selling their product added together make a total in 1920 and 1921 greater than their total net income (*Exhs. D-269 H, D-269 I, R., p. 1233, D-271 H, D-271 I, R., p. 1261*). Such expenditures to increase consumption are as inconsistent with production collectively regulated to increase prices as is the general result of them, which the Government calls "the marvelous growth of the Portland cement industry in the United States", indicated by the figures in its bill showing that the production has increased from 401,900,643 barrels in 1901-1910 to 864,247,719 barrels in 1911-1920, although the latter period includes the time of the curtailment of building operations and production incident to the war.

(4) The expenditures in competitive sales efforts showed the vigor of the competition. It is apparent that if there were any control or distribution of business among the nineteen competitors, money devoted to attempting to

get business from each other would be thrown away. The demand is created mainly by the work of the National Association, and under any imaginable condition except competition, individual selling expenses would be small. But here we have exceedingly large selling expenses, constantly increasing, as follows:—

1913.....	\$1,526,523.
1914.....	1,873,038.
1915.....	1,942,013.
1916.....	2,401,416.
1917.....	2,597,839.
1918.....	2,579,368.
1919.....	3,584,217.
1920.....	3,513,354.
1921.....	3,960,770.

(Ex. D-369 A-I, R., p. 1233)

(5) The sales and shipments showed independent and diverse individual judgments, and negative any collective control. In addition to his judgment concerning production, particularly in the slack season, the cement manufacturer is confronted by questions concerning his sales policy, which admit of and receive very different answers. These questions have to do with foreseeing future costs and prices. He must determine from time to time, whether it is advisable to tie up a large part of his production in contracts for future delivery at existing prices or avoid commitments in the expectation of higher costs and prices and when to reduce or advance his price; and his decision may mean loss if he takes too many contracts or inability to dispose of what he has produced if he takes too few or acts too slowly or quickly (R., p. 335). Wide diversity of judgment among the defendant companies is

reflected in the diverse profits considered later, and also in their sales or shipments:

Exhibits D-370 A to D-370 E, and Exhibits D-376 A to D-376 F (*R.*, pp. 1413, 1430) show how widely the shipments of each company have varied with relation to its percentage of the total capacity (*R.*, p. 275). The figures as to some of these shipments are in Exhibits 382, 388 and 390 (*R.*, p. 706). They are substantially like the production figures already mentioned. They differ in some details, because shipments were reported both from mills in the territory and from mills outside the territory owned by defendant companies which shipped some cement from those mills into the territory, whereas the production figures were of the mills in the territory. And the inventories at the beginning and end would also be necessary to an accurate balance. The diversity cannot imaginably be reconciled with the operation of any single or collective mind. It plainly reflects the independent operation of widely diverse minds.

(6) The Price Received Per Barrel by the Different Companies Shows Independence and Competition.

The amount actually received per barrel by each company affords interesting evidence of the extent to which the competition and the absorption of freight affect the earnings of the companies (*R.*, p. 272; D-296-304, *R.*, p. 1340). Although the market price at a given time and place is substantially uniform, the prices actually received by the different companies vary widely. Thus, in the year 1916, the prices received range from .806 cents per barrel by Edison to \$1.077 per barrel received by Security, a difference of 27.1 cents per barrel, with the

other companies ranging in between. In 1917, Pennsylvania realized the lowest price per barrel and Glens Falls the highest, the difference being 26.6 cents per barrel. In 1918, the prices differed 33.4 cents per barrel. In 1919, there was a difference of 29.6 cents per barrel. In 1920, Bath realized the highest price per barrel and Giant realized the lowest price, the difference being 48.4 cents per barrel. In 1921, the difference was 31.3 cents per barrel.

The average cost of, and price realized for, a barrel of cement by the defendant companies each year since the relinquishment of Government control, was:—

	Cost.	Price.
1919	\$1.467	\$1.637
1920	1.812	1.911
1921	1.625	1.711
<i>(D-279, R., p. 1333)</i>		

(7) The Earnings and Profits Show Sharp Competition.

The investments of the nineteen defendant corporations are separate and independent. Any agreement or collective control which would command their unanimous assent, would have to be one which yielded more than unrestrained competition. The Government appreciating this, in the petition charges the defendants with having made "enormous profits".

(1) There are three ways of determining the capital employed: (i) The "invested capital" defined by the Federal tax laws and regulations, is a more or less artificial figure, having to do with what was in fact put in, in certain forms, without regard to actual present value. (ii)

The replacement value (to which attention is given, for instance, in matters relating to reasonable returns on public utilities) has to do with what it would cost to replace the physical properties. (iii) The book value is the value as determined from the company's books.

Here the total "invested capital", as reported to the Government, of \$76,735,339. (*D-271, A-I, R., p. 1261*) would be \$151,622,256.09, if the replacement value was taken (*D-455, R., p. 1472*) or \$102,613,760. book value (*R., p. 3084*) for the year 1920. Since it goes back to original investment, regardless of value (*R., p. 275*), and is here so much below the other ways of ascertaining capital investment, it is not particularly fair to these defendants to use "invested capital" in determining their profits. But we confine the figures here to those based on "invested capital."

(2) Taking first the nineteen companies collectively, the profits on invested capital have been:—

1913	4.8	per cent.
1914	5.3	" "
1915	1	" "
1916	6.3	" "
1917	3.8	" "
1918	2.9	" "
1919	6.7	" "
1920	4	" "
1921	3.2	" " (<i>R., p. 1393, D-353</i>).

These are the earnings before any dividends. Such dividends as there were, had to come out of the profits thus shown or profits of years before 1913 not then distributed as dividends, but put back in the business and carried as surplus.

Industrial corporations in normal years—not in particularly good years—earned on the average at least 12 per cent. and even National Banks for 45 years have earned on an average 8.6 per cent. (*R.*, p. 300).

These defendant corporations earned 4.2 per cent. on their “invested capital”—much less than, about a third of, what is normally earned by industrial corporations and about half as much as National Banks.

That cannot conceivably be explained by any collective control to make “enormous profits” out of the public by restraining trade. But the obvious fact that there are an unusual number of well-equipped competitors engaged in exceptionally keen competition, makes the meager profits understandable.

The figure 1 per cent. in 1915 reflects the trade war of that year. 1916 was one of the best years in the history of the world, from the standpoint of profit and business generally—the net income of the corporations in the country, as reported for Federal taxation, increasing from something over five billion dollars in 1915 to considerably over eight billion dollars in 1916 (*R.*, p. 301). These manufacturers who made 5.3 per cent. in 1914, a bad year (*R.*, p. 301), made 6.3 per cent. in 1916. But during the later recent years when others have been averaging in the neighborhood of 14 per cent. after the Federal taxes are deducted, this portion of this industry has earned 3.48 per cent., except in the year 1919, when the war had operated to eliminate old contracts at low figures and make all business fresh business. Then with a building boom, they earned 6.7 per cent., almost half as much as made by the average industrial corporation (*R.*, p. 301).

Excepting the slight increases in the two boom years in cement (1916 and 1919) and the decrease in the year of cut-throat competition (1915), the defendant companies have made smaller profits each year since Cement Manufacturers Protective Association was organized (1917, 1918, 1920, 1921) than they made before (1913, 1914).

(3) And the profits of the different companies have varied as far as conceivable from any thing suggesting distribution. A few companies who have combined comparatively low costs with foresight or good fortune in making their sales when prices were at the highest point during the season, as distinguished from selling their production under contracts when prices were at a lower point, etc., have made good profits on their investment. Some whose costs have been higher and judgments less well verified by developments, have lost money. Most have made exceptionally low profits. Thus, the operations of the following companies show actual losses in the years set after their names.

Allentown, 1915, 1917, 1918, 1921 (*D-334*)

Atlas, 1915 (*D-336*)

Coplay, 1918, 1919, 1921 (*D-338*)

Edison, 1915, 1916, 1917, 1918, 1919, 1920, 1921 (*D-340*)

Hercules, 1918, 1920, 1921 (*D-343*)

Knickerbocker, 1915 (*D-344*)

Nazareth, 1913, 1915 (*D-347*)

Penn-Allen, 1915 (*D-348*)

Phoenix, 1913, 1914, 1915, 1916, 1917, 1918, 1919 (*D-350*).

Vulcanite, 1921 (*D-352*).

The same year, when Coplay and Edison and Phoenix lost money, 1919, Dexter made 23.9 per cent. on its in-

vested capital. Similar differences appear between the earnings of the different companies in every year (*D-334-D-352, R.*, pp. 1374-1392). There is no conceivable kind of agreement or thing to which these companies would all assent, that would produce such results. And, of course, the figures of loss or profits are more diverse than the percentages of invested capital, by reason of the different sizes of the businesses.

In the following table is shown, from Exs. D-334 to D-352, the percentage of profit or loss to "invested capital" as reported to the Government, the losses being indicated by black figures:

Company	1913	1914	1915	1916	1917	1918	1919	1920	1921
Allentown	3.1	9.5	.6	5.1	1.9	8.7	5.2	1.5	4.8
Alpha	8.4	8.5	4.5	5.9	4.0	3.2	6.2	8.1	1.9
Atlas	5.0	3.7	1.8	7.2	8.8	6.7	8.3	2.7	7.4
Bath	20.7	4.3	3.5	9.0	3.5	2.6	10.7	10.6	1.7
Coplay	5.9	4.5	3.7	7.9	.8	2.0	.1	.1	1.6
Dexter	15.3	12.2	1.9	17.8	21.1	9.7	23.9	11.5	19.2
Edison8	.1	1.3	.8	3.8	8.3	8.6	12.4	.8
Giant4	.2	2.2	1.5	1.1	8.8	5.5	1.4	
Glens Falls.....	13.0	11.9	4.9	10.1	15.2	11.0	16.0	3.9	14.1
Hercules						2.0	3.6	1.5	3.4
Knickerbocker ..	2.4	7.4	7.1	8.3	5.6	5.9	5.5	5.0	.8
Lawrence	6.4	9.5	5.8	10.0	6.3	7.7	12.1	6.4	2.4
Lehigh	9.8	10.9	4.8	12.8	4.8	2.9	9.2	4.2	3.5
Nazareth	5.5	2.8	5.4	9.5	7.6	8.2	11.5	15.3	3.0
Penn Allen ...	27.1	14.3	1.4	24.2	5.7	6.1	10.1	9.8	9.6
Pennsylvania ..	6.9	11.8	6.6	3.4	9.7	9.6	14.3	15.2	3.3
Phoenix	3.3	4.1	20.8	17.1	12.3	7.0	.8	16.5	15.2
Security	1.8	3.1	4.7	12.3	12.1	6.5	16.2	11.1	7.6
Vulcanite	8.2	6.8	.4	3.9	5.0	2.8	7.8	2.3	4.4

When nineteen independent manufacturers with a combined "invested capital" of more than \$75,000,000, working nine years, average only 4.2 per cent. on that small measure of their investment, less than they would have received, without effort, if their money was in Liberty bonds, charges of "enormous profits" seem—like the other charges against them.

THE LAW.

1. Cooperation among those engaged in a particular industry or calling is a common law right not prohibited but impliedly endorsed by the statute, except when "in restraint of trade or commerce among the several States or with foreign nations."

In *Attorney-General of Australia v. Adelaide SS. Co., 1913 A. C. 781*, the common law was summarized as follows:

"At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests" (p. 793).

"The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others.

The statute does not take away the right of combining with others in a common course of action, except where that action constitutes one specified injury to the public. Both the wording and meaning of the statute are precisely as if it had contained an express clause, "But no contract, combination, or conspiracy not in restraint of trade or commerce is hereby declared illegal". Co-operation or combination, with wholesome, helpful

purposes and results, is impliedly continued as commendable by the statute.

In *Anderson v. U. S.*, 171 U. S. 374, this Court upheld the propriety of a combination among live stock dealers, saying,

✓ “From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them.”

In *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 431, the Court said:

“Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes.”

Any question of restricting the freedom of traders to cooperate through trade associations because the potentiality of such cooperation in the direction of restraint may be thought to outweigh the potentiality in making industry more honest and efficient and affording those best qualified some opportunity to experiment towards the relief of the widespread distresses of industrial civilization—belongs to the legislature and not to the Court.

The general tendencies of trade associations—as distinguished from the concrete overt acts in the particular case—bear only the same relation to the Act of July 2, 1890 that considerations affecting the desirability of the possession of weapons bear to a statute prohibiting the crime of murder or assault. General tendencies of unforbidden acts are for the legislature. This statute forbids only the full crime of restraint of trade.

In *United States v. U. S. Steel Corporation*, 251 U. S. 417, this Court rejected the view that the statute forbids everything which may be regarded as "a menace to the public interest and illegal because there is potency in it for mischief" (251 U. S. 450), saying:—

"But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them" (251 U. S. 451).

2. Protective Activities relating to Credits and Specific Job Contracts are lawful.

In *Swift & Co. v. United States*, 196 U. S. 375, 395, this Court approved a decree which provided that defendants should not be restrained

"* * * from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers."

In *Anderson v. U. S.*, 171 U. S. 604, 616, the Court said with respect to the legitimate functions of associations:

"Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation."

In *Virtue v. Creamery Package Co.*, 227 U. S. 8, 37, the Court in dismissing a case where a provision for the assertion of patent rights was attacked under this statute:

"The contracts we have shown were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights."

In *Reynolds v. Plumbers Protective Association*, 30 Misc. 709 (motion for new trial denied, 63 App. Div. 650; appeal dismissed 169 N. Y. 614) the Court said:

"It must be conceded that the extraordinary development and growth of commercial enterprise and trade within the past few years and the distribution of our vast products of industry in every part of the world, has made it necessary for merchants and business men to organize for the protection of each other in their business against irresponsible parties."

In *U. S. vs. Whiting*, 212 Fed. 466, 476, the Court said:

"Considering on the one hand, the situation of the parties to the agreement, the possibilities of loss to them which unrestricted competition involved, and their right to protect themselves fairly against it, and, on the other hand, the public needs and the advantages to the public from unrestricted competition, it must appear that the de-

fendants have done more than was fairly justified by reasonable self protection."

3. The Enjoined Statistical Activities are lawful.

In view of the enormous amount of discussion of this subject, with the trend of which the Court is familiar, we merely state our submissions as to the law very simply:—

The breadth and permanence of the principles fixed in the statute, preclude any application of it on the basis of whether the kind of agreement questioned, existed before the date of the enactment. "Trade associations have been collecting production statistics of one kind or another, with increasing momentum, for over sixty years" (*Trade Association Activities, Department of Commerce, Government Printing Office, 1923, p. 12; R. p. 307*). And the fact that a particular kind of agreement was unknown when the statute was enacted would not evidence illegality (*Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 476*).

The occasion and purpose of the statute have been succinctly stated thus:

"The entrance of the Government began strongly three decades ago, when our industrial organization began to move powerfully in the direction of consolidation of enterprise. We found in the course of this development that equality of opportunity and its corollary, individual initiative, was being throttled by the concentration of control of industry and service, and thus an economic domination of groups builded over the nation. * * * Our legislation against restraint

of trade is the monument to our intent to preserve an equality of opportunity" (*American Individualism, by Herbert Hoover, Doubleday, Page & Co., 1923, p. 52-3*).

"Concentration of control" was the industrial development at which the statute was aimed. Its common form was the actual turning over of the control of an industry to a single direction—"consolidation of enterprise," "combination in the form of trust or otherwise" (26 Stat. 209). Whatever its form, it consisted essentially in the substitution of a single control for independent controls in matters (such as price or production) which affect the public interest and are essential weapons in the "conflict for advantage called competition" (262 U. S. 388).

As applied to cooperation of competitors whose selfish interests remain independent and conflicting, collective control cannot exist unless the collective will in such matters is formulated, expressed and made to prevail over the selfish, independent will of the individual.

The acts of any trader or human being must, in the nature of things, conform either to some external standard formulated by, or with the assistance of, some one other than himself, or to his own independent internal thoughts, judgment and will. In order that his acts may conform to some external standard, it is obviously necessary that that standard exist and be known to him. Otherwise the individual must necessarily be guided by his own independent judgment and will.

In the Association at bar, and among these defendants, there has been no attempt whatever to substitute concentration of control for individual freedom. There

has been no thought of attempting to formulate any collective will, to say nothing of making it prevail over the independent judgment and will of the individual.

When all the activities here had functioned to the utmost and the manufacturer turned to the inevitable questions, How much shall I charge for my cement? How much shall I produce? he could find no possible answer except, Whatever you want to and can in the exercise of your own free and undirected judgment and will. His prices and production were in no way guided by any expression or intimation of a collective will. He was as free and independent as if the Association had not existed.

The essential of restraint of trade to which we have referred, has been conspicuously present in the activities of the associations heretofore before this Court. We do not here seek to justify associations with enterprising managers employed to speak the collective will and tell the members what to do with respect to prices and production, or holding meetings where the members discuss future prices and production in such a way as in fact to formulate the collective judgment and will and substitute it for the independent judgment and will of the individual, or collectively determine a standard of price, denominated by some other name, as average cost or what-not, or the like. Such activities may (or may not according to the facts) amount to substantially the same concentration of control as was involved in turning over the individual businesses, or their direction, to a collective control "in the form of trust or otherwise" (*26 Stat. 209*).

That—not the association, but the restraint—is what the statute forbids. It does not forbid information

or knowledge, however accurate or extensive, or say that traders may have or obtain only such portions thereof as some governmental bureau may deem it proper to collect and release.

Here there is no incident or instrument of collective control or restraint. The collective will was never conceived, never came into existence and could not be expressed. Each defendant conducted his own business without collective guidance and with the utmost diversity of individual judgment.

The universal recognition of the essential importance of statistical facts by the business men of the country and the departments of the Government which come in contact with business, and the efforts of both to supply the necessary facts, cannot be attributed to any desire to restrain trade. The great bulk of business men, and these defendants, do not seek to be relieved from competition and are unwilling to surrender their opportunities to advance their own interests at the expense of their competitors. But they do seek to be relieved from ignorance—to make intelligence, clean work, efficiency and ability count—to make the game less a game of guess and gamble and more a game in which the best man wins because he is the best man.

Knowledge does not restrain trade. Ignorance tends to restrain it because of the fear of the unknown and the misguidance through "contagious optimism or equally contagious pessimism" which misleads to ruin, unemployment and misery.

It is obvious that the greater the skill and efficiency of those engaged in an industry, the greater the benefit

which will result from their competition. Blundering management, which increases costs, is not more beneficent than poor equipment or unimproved processes. The extension of the law which the Government seeks here, would amount, in substance, to insuring higher costs and depriving the public of its right to a competition of intelligent skill and informed ability.

The law, we submit, has nothing to do with prescribing how much knowledge or information those engaged in competition shall have. The sovereign here has, in other connections, undertaken to supply the information necessary to some degree of efficiency and spends millions of dollars annually to provide it. In so far as it has indicated any judgment in the premises, it has thus shown its recognition of the fact that the more information those engaged in industry have, the better. But that is a field which this statute does not touch. It leaves that to the common law right of traders to do as they please as long as they preserve their individual, independent interests, judgments and wills.

4. The provisions of the decree enjoining agreement on methods of sale, existing trade practices, etc., were unwarranted by any proof and erroneous.

These portions of the decree may be dealt with shortly without entering upon the questions of how far an industry may regulate its practices, presented by some of them and presumably of much importance in some other fields of industry. All these provisions of the decree were unwarranted because there was no evidence (or even proper pleading) upon which to adjudicate them:—

(1) The largest group is comprised in paragraph 9 of the decree, specifying fourteen trade practices (*R.*, pp. 1811-2). The injunction is not against carrying out an agreement, but only against "hereafter agreeing". There was no evidence that any such agreement had been made or contemplated. The Court did not find any such agreement. On the contrary, it found "very probably there is no agreement now in force by which such practice is to be followed" (*R.*, p. 1802). "Under the present association there is no method provided for disciplining and penalizing members for a departure from the foregoing practices * * *. Neither is there now any compact that cement shall not be sold below a specified price" (*R.*, p. 1803).

(2) The provisions of paragraph 5 of the decree are against agreeing to cancel specific job contracts which are "duplications", or the "padding" therein (*R.*, p. 1810). There was no evidence of any such agreement. On the contrary, the Court expressly found that

there was no such agreement, saying:— “Of course if a company wished to recognize an agreement made with a contractor or person who had expected to supply cement to a specific job and who did not get the work but was willing to take the cement notwithstanding, it might do so” (*R.*, p. 1805).

(3) Paragraph 7 of the decree prohibits agreement to publish freight rate books giving rates “from any arbitrarily established freight basing point”, but permits collective publication of “the actual rates between points of actual shipment and delivery” (*R.*, p. 1811). Here again there was no evidence of “any arbitrarily established freight basing point”. On the contrary, the Court found, “The freight rate books standing alone, and in so far as they merely record a compilation of lawful freight rates, are harmless. Their vice, if such it be, resides in the fact” that, in substance, they were used to quote delivered prices (*R.*, p. 1802).

(4) The remaining provision, paragraph 8 of the decree, prohibits agreement as to giving credit (*R.*, p. 1802). There is no suggestion in pleading, evidence or opinion that such agreement existed or was contemplated.

The discussion of the limited collective activities here, tends to misplace them. Their chief importance to these defendants results from the pending criminal cases based on them. But the principles involved seem of importance to all industry.

Where, as here, we find an exceptionally large number of well-equipped competitors, each of whom has preserved its selfish interest and investment wholly independent of all the others, and newcomers, like the defendant Hercules, freely entering the field, there are the strongest reasons for recognizing that, in the words of this Court:

“The natural evolutions of a complex society are to be touched only with a very cautious hand” (*Board of Trade vs. Christie*, 198 U. S. 239, 247-8).

More recently the Court said:—

“The great purpose * * * was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs”. (*Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 457, 463, 476).

Since the introduction and increased use of machinery has done away with geographical limitations and created large units of production, the life and happiness of the individual no longer depend simply on what occurs within his neighborhood, but upon the intelligence

and efficiency with which large industries producing most of his food, clothing and shelter, and producing also directly or indirectly his means of procuring them, are conducted. The problems of this industrial era are of enormous importance and largely unsolved. Efforts towards their solution, cooperative or otherwise, by increasing the intelligence, honesty and efficiency of any industry, or preventing economic waste, are to be encouraged as representing helpful and hopeful embodiments of that common law right of traders, and others, to do as they choose, upon the exercise of which the solution must depend.

If, when all the cooperation in a particular industry has functioned, there is no collective control but each competitor continues to retain his own independent interest and investment and preserves his own independent will and judgment as to his own future production, sales and prices, there is no restraint of trade.

To the extent that these defendants have cooperated to make their industry more honest and more efficient, while preserving unimpaired the complete independence of investment and conduct of each, their efforts seem helpful, hopeful and commendable. But it is enough that they do not offend the statute or any other law.

The decision below should be reversed and the cause remanded with instructions to dismiss the petition.

Respectfully submitted,

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GEORGE T. BUCKINGHAM,
ARCHIBALD COX,
Counsel for Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924.

CEMENT MANUFACTURERS PROTECTIVE
Association, The Atlas Portland Ce-
ment Company, The Allentown Port-
land Cement Company et al, Appel-
lants, v.
THE UNITED STATES OF AMERICA.

No. 551.

BRIEF AND ARGUMENT ON BEHALF OF THE GOVERNMENT.

STATEMENT OF THE CASE

The original petition was filed June 30, 1921, against the Cement Manufacturers Protective Association, a voluntary association, and nineteen corporations engaged in the manufacture of cement, which constitute the membership of said association. (Vol. I, p. 1.) The petition alleged a violation of the Antitrust Law of July 2, 1890; but it is unnecessary to here repeat its allegations (Vol. I, pp. 1-20), as it is not questioned that they state a case and

[NOTE: All italics are ours, unless otherwise stated. When the name of an individual is used, there generally will be given in parentheses the name of the company he represented. In quoting, this is our addition.]

cover all the activities proven. The answer of the defendants (the terms plaintiff and defendants will be used as in the court below) elaborately discusses, and either admits or denies, every allegation of the petition. (Vol. I, pp. 20-125.)

About the same time this petition was filed, an indictment was returned against the defendants by a grand jury sitting in the Southern District of New York. The trial of the criminal case began April 4, 1922, and lasted until May 26, and resulted in a mistrial. On December 15, 1922, it was stipulated that District Judge Knox, who presided at the trial of the criminal case, might determine the civil case upon the record made on that trial. (Vol. I, p. 144.) After argument in February, 1923, the court on October 23, 1923, handed down an opinion (Vol. III, pp. 1797 to 1809), in which he held for reasons stated that the allegations of the Government's petition were sustained by the proof and that "the Government may have the decree for which it asks." A final decree was entered on December 13, 1923. (Vol. III, pp. 1809-1813.) Errors were assigned by defendants, and an appeal was prosecuted to this court.

BRIEF AND ARGUMENT

I

THE MANUFACTURE AND SALE OF CEMENT

THE MANUFACTURE OF CEMENT.

In order to fully understand some of the objects of the practices engaged in by defendants, it is necessary to know something about the manufacture and nature of cement, and the manner in which it is handled.

Holger Struckmann, construction engineer and witness for the defendants, explained in some detail the nature of cement and the processes of its manufacture. The raw materials from which cement is manufactured are limestone and shale, or limestone and clay, which in some localities are properly mixed by nature. Through a number of processes particularly described this material is mixed, dried and crushed until it is reduced to a fineness which permits 98% to pass through a sieve with 10,000 meshes per square inch. It is then placed in silos or bins, and taken therefrom under the supervision of the chemist and fed into a long kiln, one end of which is elevated above the other. In the lower end of this kiln the fuel is injected and ignited, and as the cylinder revolves the material travels from the upper to the lower end. The temperature at the upper end is approximately 1000° Fahrenheit; it gradually increases until it reaches a temperature of

2500° to 2800°, when the chemical combination of lime, aluminum, silica and iron is formed; and the finished clinker is discharged from the kiln as a white-hot slag or lava.

The last stage of the process is the grinding of the clinker, which is done after it has gone through a seasoning process, necessary to eliminate all uncombined lime. The finished product is then delivered into packing bins by machinery. (Vol I, pp. 265-267.)

It will hereafter be observed in examining the reports of stocks on hand and production that there is as much attention given to clinker as to cement; and to understand the relevancy of the reports it is important to keep in mind the distinction between the clinker and cement. As said by Mr. Elliot: "Clinker is not subject to deterioration when exposed to the weather" (Vol. I, p. 145), while cement, the finished product, will rapidly deteriorate when exposed. Mr. Morron, president of the Atlas Company, said: "To a great extent clinker is non-perishable, while cement is perishable." (Vol. I, p. 338.) The final process of converting clinker into cement is quickly performed; and therefore in order to understand the exact condition of a competitor as to its stocks on hand and its ability to meet orders, it is probably more important that the amount of clinker be reported than the amount of cement, as the cement can not be kept in storage except for a limited period of time.

THE SALE OF CEMENT.

The cement manufacturers maintain sales forces, which consist of sales managers and a number of sales agents, and the cement is distributed both through dealers and directly to contractors. A very large per cent is sold to dealers, and is retailed by them in small lots. A considerable quantity is sold to contractors through dealers, and the remainder is sold directly to contractors, or to public utilities engaged in construction work. (Elliot, Vol. I, p. 145.) Mr. Morron testified with reference to the business of the Atlas Company, which is the largest manufacturer of cement in the world, that about 60 or 65% of its business goes to dealers who sell it out in wagon-load lots; that 25 to 30% passes through dealers to contractors, while the remainder is sold *directly* to large consumers. (Vol. I, p. 330.)

The cement used by contractors is bought either directly from the manufacturer, or through the dealer, on what is known as specific job contracts. This contract always contains the provision *that the cement sold is to be used only upon the job described*. This specific job contract is one of the very important features of this litigation. If the cement be obtained by the contractor through a dealer, the contract is made between the manufacturer and the dealer; and there seems to be a diversity of custom as to whether an agreement to the same effect is made between the dealer and the contractor.

II

**ORGANIZATIONS OF MANUFACTURERS
OF CEMENT****THE PORTLAND CEMENT ASSOCIATION.**

The Portland Cement Association is commonly known and will be hereinafter referred to as the National Association. In a letter of August 30, 1920, addressed by Mr. Kinney, General Manager, to Mr. Naylor, President of the Kniekerbocker Portland Cement Company, it was stated that on September 11, 1902, the first meeting of Portland cement manufacturers was held at Sherry's in New York City, which meeting was the forerunner of many similar meetings that resulted in the formation of the Portland Cement Association; and a photographic copy of the call of the first meeting was inclosed for Mr. Naylor to frame and hang in his office, if he so desired. (Vol. II, p. 669.) That first call reads as follows:

The undersigned, manufacturers of Portland Cement, recognizing the fact that the present methods of handling the subject of "sacks" are almost universally unsatisfactory, and believing that the question can be profitably discussed and a satisfactory plan evolved at a meeting of the representatives of the Eastern Mills, hereby pledge themselves to attend such a meeting to be held at such time and place as may be most convenient to a majority of those signing.

It was signed by twenty-two manufacturers, eleven of whom are defendants in this case. (Vol.

II, p. 668, side p. 1363½.) The offices of the association were in the Bellevue Court Building, Philadelphia, until 1916, when it was re-organized and its offices removed to the Conway Building, Chicago. (Vol. II, p. 668, side p. 1363.) The date of this re-organization and removal of the offices of the national association, to wit, 1916, should be kept in mind, as in that same year the defendant Cement Manufacturers Protective Association was organized.

The present secretary of the association, Mr. Kinney, was placed upon the witness stand by the Government; and by him it was proven that all of the defendant manufacturers are members of the national association except the Lawrence Cement Company, which was elected a member September 11, 1902, but resigned in 1911. (Vol. I, pp. 194-195.) He filed as exhibits three pamphlets, one published in 1915, another in 1916, and a third in 1919, which set forth the trade practices prepared and recommended by a committee of the National Association (p. 195). Mr. Kinney also stated that about the only reports made to the association at the present time are connected with the accident prevention and insurance work and with the conservation bureau; *but that the members had reported the amount of production and shipments of cement until shortly after the decision of this court in the Hardwood Lumber Case in January, 1922.* (Vol. I, p. 195.) On cross examination, without objection on the part of the Government, Mr. Kinney

testified very fully as to the activities of the National Association.

He said that the association has about 320 employees, with branch offices in twenty-three cities, and a membership including companies in South America, Mexico and Canada. One of its principal activities is the promotion and inspection of concrete roads. It advises highway officials, city engineers and others as to how best to construct roads. It maintains an extensive laboratory in Chicago, where it has developed the best uses of cement. It has a farm and cement products bureau devoted to the development of the uses of cement and concrete on farms. It has a structural bureau that works with architects and engineers in the development of new and better uses for cement. Its advertising department spends usually \$200,000 a year. It also has an accident prevention department, which looks after the guarding of machinery in plants, etc. It has a conservation bureau in which a study is made of ways and means to avoid waste of heat in burning, waste of dust, etc., and at one time it had a uniform cost accounting bureau. It has about two hundred engineers engaged in field work. There were filed as exhibits to his evidence many leaflets or bulletins which treat of practically every question touching the uses of cement. He said they had expended in laboratory research work since January 1, 1918, \$218,819.65; in the last four years they had expended for advertising \$544,425.14, and on the

highway bureau in the same time \$154,459.09. In fact, the income of the association for the previous year was \$1,750,000, the amount contributed by each member being 8 mills per barrel on the production of the second preceding year. (Vol. I, pp. 196-204.)

Mr. Kinney's testimony conclusively shows that practically every activity that can conceivably be of legitimate benefit to the industry was being engaged in by the so-called National Association at the very time the defendant Cement Manufacturers Protective Association was organized, and that its activities have continued down to the present time; and that, therefore, there was left no legitimate excuse for the organization of a subordinate association to promote the welfare of the industry and to protect those engaged therein.

ORGANIZATION OF SECTIONAL ASSOCIATIONS.

As will hereinafter appear, the defendant Cement Manufacturers Protective Association was organized in 1916, the same year the national association was re-organized and its offices moved to Chicago. From the allegations of the petition (Vol I, p. 6) and the admissions of the answer (p. 47) it appears that the following organizations or agencies were formed about the same time, and subsequently:

- (1) The Mid-West Cement Credit & Statistical Bureau, with headquarters at Chicago, organized by the cement manufacturers in the middle

West in 1917, substantially along the lines of the defendant association.

(2) The Southern Audit & Statistical Bureau, with headquarters at Dallas, Texas, a name under which an individual carried on the business of collecting and exchanging information for the cement manufacturers in that section of the country.

(3) The Norcross Audit and Statistical Bureau, with headquarters at Kansas City, Missouri, being a bureau of the same character and conducted by the same individual as the Southern Audit and Statistical Bureau.

(4) The Southern Statistical Bureau, with headquarters at Atlanta, Georgia, organized in 1918, its activities being in substance, but not in form, more like those of the defendant Cement Manufacturers Protective Association.

None of these associations and bureaus has any connection with the so-called National Association. In other words, while the National Association is composed of nearly all the cement manufacturers in the United States (See Gov. Ex. 242, p. 664, side p. 1296, Vol. II), the manufacturers located in the several sections of the country have organized local associations for particular purposes which act independently of the National Association; but as to some matters, as will hereinafter appear, they adopt recommendations made by the National Association.

III

**HISTORY OF EVENTS LEADING UP TO
ORGANIZATION OF DEFENDANT CEMENT
MANUFACTURERS PROTECTIVE
ASSOCIATION**

Acting independently of the National Association, the group of manufacturers located in the northeastern part of the United States and extending into Virginia have from time to time formed combinations and schemes clearly for the purpose of controlling the production and prices of cement produced in that section of the country.

ASSOCIATION OF LICENSED CEMENT MANUFACTURERS

The first of these combinations was known as the Association of Licensed Cement Manufacturers. From the stipulation filed as Gov. Ex. 544, Vol. II, pp. 725-727, it appears that Hurry and Seaman, employees of the Atlas Company, obtained patent, No. 645031, on March 6, 1900, for the burning of powdered coal in the production of clinker, the use of coal being thereby substituted for oil, which it was claimed effected a saving in the cost of manufacture. The validity of this patent was contested; and after the case was argued and before the decision was handed down, a settlement was effected between the parties and other cement companies who were using substantially the same apparatus. Pursuant to this settlement, on November 23, 1906, the North American Portland Cement Company was incorporated, its capital stock being subscribed by

the Atlas, Lehigh, Alpha, American, Vulcanite and Lawrence companies, all of which are defendants herein, except the American Company. By contract of December 3, 1906, the Atlas Company granted to the North American Company an exclusive license with power to sublicense the use of the inventions covered by the Hurry and Seaman patent, retaining itself the right to manufacture. And at the same time the North American Company granted to the Lehigh, Alpha, American, Vulcanite and Lawrence companies licenses to use said inventions; and afterwards several other manufacturers were granted similar licenses. *On December 30, 1907*, the Association of Licensed Cement Manufacturers was formed, which was composed of the licensees of the North American Company. In the meantime, on April 16, 1907, the United States Circuit Court of Appeals handed down its opinions in the Rubber Tire Company case, 154 Fed. 358, and in the Case Threshing Machine Company case, 154 Fed. 365, which opinions had been communicated by counsel to the organizers of the association. Subsequently, said court of appeals rendered a decision of like character in the Goshen Rubber Works case, 166 Fed. 431. On January 13, 1909, a supplemental license was executed by all the companies except the Northampton Company, which had gone into bankruptcy, they being advised by counsel that the license was in exact accordance with the decisions of the Circuit Court of Appeals for the Seventh Circuit. *In January, 1911*, the Association of Licensed

Cement Manufacturers was dissolved; and in 1912 the Court of Appeals for the Seventh Circuit held that unless the broad claims of the Hurry and Seaman patent were limited to the particular means for burning coal they were void because too broad, and consequently that there was no infringement. (196 Fed. 385.) Copies of the license agreement and of the articles of association were filed as Gov. Exhibits 545-550. (Vol. II, pp. 727-776.) The agreement entered into on January 13, 1909, between the North American Company and the several licensees, the number of whom was sixteen, all but four of whom are defendants to this suit, clearly indicates the purpose of that organization. (Vol. II, pp. 756-776.) This agreement is quite lengthy, and covers every phase of the entire industry. Special attention is called to some of the provisions contained therein. It was provided that during the existence of the agreement each licensee should enjoy the non-exclusive right and license to manufacture under the inventions mentioned, subject to the terms, conditions and covenants expressed in its license, but only within the limitations specified and only in full compliance with the minimum prices set forth in Schedule A thereto annexed, and in compliance with all the terms and conditions of said schedule; and that:

to insure the due observance thereof, each of the parties hereto hereby agrees that it will not, except as provided herein or in said Schedule "A," directly or indirectly sell, de-

liver, or otherwise dispose of or be interested in the sale, delivery or other disposition of any Portland Cement covered hereby, or offer to sell, deliver or otherwise dispose of any such cement otherwise than in full compliance with the terms and conditions of this Agreement and of said Schedule "A"; and will not, except as in said Schedule "A" expressly provided, allow to any consumer, dealer, or to any purchaser whatever, any commission, discount, rebate or reduction from any prices fixed in said Schedule "A" except in settlement with insolvent debtors for such cement previously sold and will not, directly or indirectly, grant or give any bonus or gratuity in connection with the sale or other disposition of such cement, except, however, that a prospective purchaser requesting a sample for test may be given a sample not exceeding one barrel. (Vol. II, p. 758.)

It was also provided that the licensor might by written notice to each party reduce the minimum prices generally for any one or more delivery points or sections set forth in Schedule A; that the licensor might upon unanimous vote of all the members of its Board of Directors (the directors being appointed by the six manufacturers mentioned in the certificate of incorporation, to wit, the Atlas, Lehigh, Alpha, American, Vulcanite and Lawrence companies) present at the meeting of the Board, change or add to any of the prices, terms and provisions of Schedule A; that if a licensee should be

held by the ARBITRATOR, elected by the Board of Managers of the Association of Licensed Cement Manufacturers, to have violated any of the limitations, terms and conditions and covenants of the agreement or to have done any act or thing in violation thereof, then *such licensee should forthwith pay* to the licensor as liquidated *damages* and not as a penalty, a sum amounting to not less than five cents per barrel, and not exceeding fifty cents per barrel on the entire amount of Portland cement sold or otherwise disposed of by such licensee in violation of any such limitations, terms, conditions and covenants of the agreement or of Schedule A, and that such damages should be paid "*in case of quotations or offers to sell* as well as in cases of actual sales of Portland cement in violation of any such limitations, terms, conditions or covenants," *but that the damages should not exceed for any one calendar year a sum equal to ten times the amount of the total original deposit of the licensee* as specified in the agreement; and stringent provisions were inserted to enforce the collection of the damages adjudged. It was further required that the licensee should report its production *under oath*, and that all the transactions of the licensee relating to business covered by the agreement was subject to investigation and audit. The country was also divided into Territory A and Territory B. Territory A embraced the New England States, New Jersey, Delaware, District of Columbia, North Carolina, and South Carolina, and all portions of

New York, Pennsylvania, Maryland, Virginia (excluding West Virginia), lying east of a line particularly described: and the provisions of the license applied only to Territory A, unless it should be thereafter extended upon notice. Strict requirements were made with reference to prices, discounts, terms of payment, branch offices, sales agents, purchase of bags, statements of outstanding quotations and contracts, lists of delivery points, and minimum prices; and *in fact there was no subject, however small, which was not fully covered by said schedule.*

It is perfectly manifest that the Hurry and Seaman patent was used as a mere cloak to conceal the real purpose and intent of the parties to the agreement. The principles of the cases decided by the Court of Appeals of the Seventh Circuit, which it was claimed justified the formation of the License Association, have long since been repudiated by this court. But in fact, it can not be in good faith pretended that those decisions gave any justification whatever for the combination and agreement entered into by those manufacturers of cement. The Hurry and Seaman patent only applied to the use of a fuel in the reduction of the raw material to clinker. After it was made into clinker there remained another grinding process by which the material was converted into the finished product. There was no pretense that there was a patent even upon this ultimate process; and of course there was no claim that any invention or improvement was em-

bodied in the finished product. And it is inconceivable that the members of that organization and its attorneys could have believed that such a claim of patent could give any legitimate excuse for an agreement whereby the price of cement and all the practices relating to its sale could be fixed and regulated. It might as well be claimed that all the manufacturers of brick who happen to use some patented device in some process of their manufacture could form a combination fixing the price of brick, or that the millers of the country who happen to be using some patented machine in grinding wheat could fix the price of flour.

While that agreement was discarded and the association dissolved a number of years ago, yet the District Court held that its existence and acts were competent as evidence tending to show the purposes for which the defendants entered into the present Association.

PERIOD FROM JANUARY, 1911, TO SEPTEMBER, 1912

So far as the Government has been able to ascertain, the corporate defendants did not belong to any local or sectional organization during the period from January, 1911, to September, 1912. Early in September, 1912, Mr. Morron, the president of the Atlas Company, invited a number of officials of competing companies in the East to have dinner with him at the Knickerbocker Hotel in New York

City on September 26. The invitation to that dinner read in part as follows:

For some time I have hoped for an opportunity to become better acquainted with the men who are interested in the welfare of the cement industry in the East, and I hope no previous engagement will prevent me having the pleasure of seeing you on the date above mentioned. (Vol. II, p. 777.)

The dinner at the Knickerbocker Hotel was attended by thirty or forty cement manufacturers. (Vol I, p. 337.) The record does not show what transpired at that dinner; but six weeks later, on November 7, 1912, representatives of seventeen of the corporate defendants in this case assembled at the Hotel Astor in New York City for the purpose of deciding on the advisability of forming an association of cement manufacturers having mills located in the East. (Vol. II, p. 778.)

EASTERN CEMENT ASSOCIATION.

The Eastern Cement Association was launched at a meeting of cement manufacturers held at the Hotel Astor in New York City on November 7, 1912. Among others who attended this meeting were representatives of the following defendant corporations:

1. Allentown Portland Cement Company.
2. Alpha Portland Cement Company.
3. Atlas Portland Cement Company.
4. Bath Portland Cement Company.

5. Coplay Cement Manufacturing Company.
 6. Dexter Portland Cement Company.
 7. Edison Portland Cement Company.
 8. Glens Falls Portland Cement Company.
 9. Knickerbocker Portland Cement Company.
 10. Lawrence Portland Cement Company.
 11. Lehigh Portland Cement Company.
 12. Nazareth Cement Company.
 13. Penn-Allen Cement Company.
 14. Pennsylvania Cement Company.
 15. Phoenix Portland Cement Company.
 16. Security Cement & Lime Company.
 17. Vulcanite Portland Cement Company.
- (Vol. II, pp. 778-9.)

The minutes show that the call for this meeting was sent out by the chairman of a committee which had been appointed to determine the advisability of forming such an association (Vol. II, p. 778); and that a plan, constitution, and by-laws were prepared and ready to be adopted, and were unanimously adopted. (Vol. II, p. 779.)

The record does not show when, where, and by whom this committee was appointed, or when, where, and by whom the plan, constitution, and by-laws were formulated. In view of the fact that the president of the Atlas Company brought the manufacturers of cement in the East together at a dinner on September 26, and that he attended the organization meeting of the Association and was

elected president thereof, it may fairly be inferred that the Association had its inception at the Knickerbocker dinner.

The minutes of the meeting held on November 7, 1912, recite:

After some discussion the Executive Committee decided that the representation at meetings of the Eastern Cement Association should be confined to Executive Officers only of the Companies who are members of the Association. (Vol. II, p. 780.)

The minutes of the meeting of December 3, 1912, recite:

Mr. Cox of counsel was also present. Mr. Arthur J. Eddy was present by invitation and explained to members of the Committee the operation of the "Eddy Plan" and answered all questions put to him by members of the Committee and Mr. Cox on same.

It was decided to advise the members of the Association that the question of the adoption of the Eddy plan, or one similar thereto, was being considered by the Executive Committee and would be taken up further. (Vol. II, p. 781.)

The minutes of the meeting of December 27, 1912, show that:

Mr. Cox of counsel stated that he thought that there was some legal objection to the Eddy Plan in its entirety and some serious objections from a legal point of view to the present Constitution and By-Laws of the Association. He was requested to draw up a

Constitution and By-Laws and a Reporting Plan, eliminating these objections, for submission to the next meeting of the Association. (Vol. II, p. 782.)

At a meeting held January 7, 1913, a proposed form of constitution and by-laws was submitted and adopted. The following excerpts are the only portions that are of sufficient materiality to quote:

Article III. . . .

(h) To obtain and make available accurate and complete statistical information concerning the manufacture and sale of cement, *including correct statistics regarding the capacities and outputs of all plants engaged in the manufacture of cement, together with periodical reports regarding outputs, shipments, orders and prices,* and accurate information concerning labor conditions, material markets, supply markets, and all conditions affecting the industry generally, to the end that each member may have in the most accurate and complete form possible all the data desirable for the most intelligent and efficient conduct of his business. . . . (Vol. II, p. 786.)

Article VII.

No member of the Association shall enter into any arrangement, agreement or understanding of any nature or kind whatsoever the object of which is to restrain trade, limit competition, or accomplish any purpose contrary to the spirit or letter of the law or contrary to the objects of the Association as set forth in this Constitution. (Vol. II, p. 788.)

While this Eastern Association was in existence the Amsterdam Building Company of New York City sought bids on 10,000 barrels of cement required in the construction of the Samaritan Hospital at Troy, N. Y. Eight members of the Eastern Association submitted bids, and every bid was \$1.64, f. o. b. Troy, N. Y., with 1 cent per barrel discount for payment in 10 days, 30 days net, and 10 cents for each sack returned. Of the eight companies bidding, seven are defendants in this case, namely, the Alpha, Edison, Glens Falls, Knickerbocker, Lehigh, Pennsylvania, and Vulcanite. (Vol. II, pp. 812-821.)

On January 9, 1913, Mr. Mallory, president of the Edison Company, who was also chairman of the Committee on Statistics of the Eastern Association, transmitted to Mr. Morron, president of the Atlas Company, who was also president of the Eastern Association, a copy of a report by the Committee on Statistics, and added to the letter the following postscript:

I have sent a duplicate of the above letter to every member of our Association and *also to the companies who are not members* as I believe it is desirable to have them all thoroughly understand the *danger of overproducing in the winter months.* (Vol. II, p. 707.)

On January 30, 1913, Mr. Mallory wrote Mr. Morron suggesting that certain statistics desired be procured from the Portland Cement Association.

(Vol. II, pp. 707-8.) This indicates that the Eastern Association was duplicating some of the work done by the National Association. In this same letter reference was also made to the desirability of forwarding to the executive officer of each of the members a typewritten sheet showing the production, shipments, and stock on hand of each individual company.

The Eastern Association was formally dissolved *on the advice of counsel* on March 4, 1913. (Vol. II, pp. 795, 797.) However, there is reason to question the good faith of the dissolution because on the following day Mr. Mallory, president of the Edison Company, who had been chairman of the Committee on Statistics of the Eastern Association, wrote his sales manager as follows:

Because of a recent decision of the Court of Appeals in the State of New York, and the recent Wilson bills, passed by the State of New Jersey, it has been deemed wise to discontinue the Eastern Cement Association—not because it is illegal but to avoid the possibility of our action being misinterpreted. *We will make no changes in our trade practice or prices.* (Vol. II, p. 812.)

On March 20, 1913, less than three weeks after the alleged dissolution of the Eastern Association, the sales manager of the Edison Company wrote the president of his company that the Lehigh Com-

pany had quoted a contractor at Tuckahoe, N. Y., \$1.67 per barrel, saying:

This price is 1¢ under the dealers' price and 6¢ under the *book* price to contractors. *Can you not get the Lehigh to withdraw this quotation or permit us to meet it?* (Vol. II, p. 812.)

Back in the days of the Licensees Association, which was abandoned in January, 1911, there was a price book which showed the price to dealers and contractors at any given point of delivery, and this reference to a book price indicates that the manufacturers of Portland cement were still using some kind of a price book.

CONDITIONS IN THE TRADE BETWEEN DISSOLUTION OF EASTERN CEMENT ASSOCIATION ON MARCH 4, 1913, AND ORGANIZATION OF CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION ON JANUARY 6, 1916.

The evidence shows conclusively that following the dissolution of the combination of licensees of the North American Company, in parts of 1914 and 1915, competition assumed the proportions of a price-cutting war. Mr. Elliot, who was in 1914 and 1915 with the Alpha Company, but now is vice-president in charge of the sales of the Whitehall Cement Manufacturing Company, testified that prices went very low in 1914 and 1915. He thinks the price was the lowest at which cement had ever been sold. He sold cement as low as 60c at the mill.

(Vol. I, p. 152.) Mr. Whipple, who at that time was salesman for the Atlas Company, said that in 1914 and 1915, there was more competition than at any other time during the five years from 1910 to 1915; that the general trend was downward from perhaps the fall of 1914 until the late spring of 1915; that the lowest point quoted was 58c a barrel at the Lehigh Valley base; but that it advanced considerably the latter part of the summer and in the early fall of 1915. (Vol. I, p. 169.)

Luther Keller, a dealer who resided in Scranton, Pennsylvania, gave the price at Scranton, beginning with the month of April, 1915, when it was at its lowest point, as \$1.25. In May it increased to \$1.35; in June to \$1.45; in August to \$1.55; in October to \$1.65; and in December to \$1.70, where it remained until July, 1916. (Vol. I, p. 173.) Mr. Gilbert, a dealer, and Mr. Oakley, a builder, also remembered the cutting of prices in 1914 and 1915. (Vol. I, pp. 185, 222.) Mr. Morron, president of the Atlas Company, described the price war in some detail. He said it began in 1914. At that time the mill price was 90¢ a barrel. His company did not lead in putting the price down, nor in putting it up. The price went as low as 60¢, but Atlas did not go below 65¢ except in rare instances. He always thought that the attack was principally by the Lehigh Company on the Atlas Company for the purpose of taking away its dealers, which is probably the most valuable asset a manufacturer has. He doesn't think that they looked upon the Atlas Company as

being in particularly strong financial shape; and they commenced to drop the price and kept it going at 5 or 10¢ a time until everybody was losing money. The Atlas met it until it got down to 65¢, when it notified its salesmen to go to the trade and explain the situation, and give them to understand that the Atlas would not sell below that price no matter what the other fellows did; and they got a good deal of business at 65¢ while the other fellows were taking business at 60¢. The price began to rise in May, 1915. The average price realized by the Atlas for the year was 72¢. (Vol. I, pp. 332-333.)

But during the entire period from March 4, 1913, to January 6, 1916, when the defendant association was organized, there were communications passing, and some kind of tacit understanding existed between some of the manufacturers, probably nearly all of them; and there was also from time to time an effort, especially upon the part of Mr. Morron, to bring about another organization. This is clearly shown by the following correspondence:

On July 22, 1913, Mr. Morron, of the Atlas Company, wrote to the president of the Whitehall Portland Cement Company (not a defendant in this case) thanking him for certain statistics, and observing that the ratio of shipments to production—

is just about right, and the percentage of operation as related to maximum was very well attended to in each instance. (Vol. II, p. 708.)

In a speech delivered in December, 1913, at the annual dinner of the Cement Manufacturers, Mr. Morron said:

Good judgment in regard to output will be far more substantial than even the best distributing advantage and force which any company may have. In an industry which has shown a continued increase from its inception in this country, where amounts shipped each year for 10 years has been greater than the preceding year, and where new usages are going to increase the demand, in spite of general present conditions, *it would behoove each one of us, and not just some of us, to be cautious in not manufacturing and carrying in stock the capacity of a mill but to curtail according to what each may think is a normal condition, and realizing that should he continue to violate the 11th commandment he will force others into the same position.* (Vol. II, p. 709.)

When called upon to explain the Eleventh Commandment, Mr. Morron said it was "Don't be a hog." (Vol. I, p. 337.) In other words, "Don't overproduce."

On February 16, 1914, Mr. Morron wrote Mr. Hagar, president of the Universal Company (not a defendant in this case), stating among other things:

Your stock on hand February 1st was less than it was on January 1st and it brought to my mind that *perhaps the difference might be in clinker unreported.* Am I right? (Vol. II, p. 710.)

In a letter dated April 9, 1914, Mr. Morron transmitted to Mr. Hagar the Atlas production figures for March, 1914, observing:

You will notice that we are way below our March of last year, too. (Vol. II, p. 710.)

On May 14, 1914, Mr. Morron again wrote Mr. Hagar saying:

Enclosed find our figures for April. (Vol. II, p. 710.)

On March 5, 1915, Mr. Morron wrote Mr. Affleck, who then appears to have been president of the Universal Company, in part as follows:

I am very glad to have your letter of the 3rd and return you our figures for the month of February *and write particularly to congratulate you upon the curtailment of your output of both clinker and finished product.* It is the science of merchandising to do this and it will win in the end just as sure as night follows day. (Vol. II, p. 711.)

It is especially significant that two of the largest manufacturers of Portland cement in the world should be curtailing their output in February, on the threshold of the open season for cement. At the very time they should have been filling their bins with cement to meet the prospective summer demand they were curtailing production and congratulating themselves for doing so. Attention is also invited to the distinction drawn between clinker and the finished product.

In July, 1915, an effort was under way to bring together representatives of five or six of the larger cement manufacturing companies. On July 12, 1912, Mr. Morron addressed a letter to Mr. Gowen, a vice president of the Lehigh Company at Chicago, which reads as follows:

On my return this morning I find your telegram of the 9th and have just wired you that if convenient to you, I should prefer Thursday, July 22, to see the gentlemen whom you mention. I would like very much to have all of you lunch with me at one o'clock if you will on the day that you are here. *I have no doubt at all that the topic which you want to discuss is one that we have a perfect right to discuss*, and I know you feel as I do that if five or six important cement companies get together for a meeting, that it is very often misconstrued. I know this to be so because of the fact that when the United States was looking into the cement situation as applied to previous years, that one of the questions asked me over and over again was, had I been in conference with my competitors. I told them I had, if there had been any conference, and then always told them exactly what was discussed, so that we must be sure that with such a meeting as you suggest, we only discuss the things that can be reported. Please pardon my making this suggestion, as I feel that it already echoes your own ideas, but there are so many people eager to misrepresent conditions that I wanted to go on record as to just how we felt.

I hope you will be able to accept my luncheon invitation, which will be a pleasure to me, and, if so, will you extend the invitation to the other gentlemen. (Vol. II, p. 998.)

With the recollection of an investigation of the cement industry by the Government fresh in his mind, the president of the Atlas Company realized the importance of making a record for use in the future should the Government again investigate the subject.

Mr. Gowen's reply to the above letter reads as follows:

I have before me your letter of July 12th and will be more than delighted to take lunch with you at one on Thursday, July 22. The matter we are particularly anxious to talk over is one which is close to your heart I know, viz., pertaining to the furtherance of the Association and the people I was anxious to have there are Mr. Young, Mr. Brown, Mr. Affleck, you and myself. I talked to Mr. Affleck over the telephone this morning, and he stated that one o'clock would be agreeable to him, and if you will let us know the place where we are to meet for lunch, I will arrange to be there at the time you mention. (Vol. III, p. 1122.)

Mr. Morron claimed in his testimony that after looking it up he was satisfied that the topic referred to was the change of the manager of the National Association. (Vol. 1, p. 328.) But the character of the correspondence, especially the wary tone of Mr.

Morron's letter, is striking. Why not mention such an innocent purpose outright? Why should they feel that the meeting of five or six manufacturers of cement was such a suspicious incident when the National Association was functioning continually?

Neither of these letters contains any reference to the change of an officer or employee of the National Association; and two other letters exchanged between the same parties prior to the luncheon on July 22 contained no reference to such subject.

Anyway, representatives of the Atlas, Lehigh, and Alpha Companies, the three largest cement manufacturing companies in the United States, met together on July 22, 1915, and had an opportunity to discuss any subject in which they were mutually interested.

An important circumstance is that this correspondence was had and the meeting was held during the time of the fierce trade war. And Mr. Morron attributes the war *to an attack by the Lehigh Company upon the Atlas.* (Vol. I, p. 332.) Yet they are found sitting at the same table with the most friendly relationship existing between them.

In October, 1915, a few months prior to the organization of the Protective Association, Mr. Coogan, a vice president of the Alpha Company, addressed the following letter to Mr. Beach, president of the Pennsylvania Company:

As you are aware, the undersigned, in connection with Mr. Mallory, *has been appointed to gather, tabulate, and disseminate certain*

statistical information with regard to the production, shipments, and stocks of cement AND CLINKER, and also information regarding contract obligations extending beyond January 1, 1916. We are anxious to have, just as early as possible, a statement of your contract obligations extending beyond January 1st.

In order to enable us to have this information properly tabulated, we would appreciate it very much if you would kindly make up a list of your contracts, giving the information with regard to same as shown on the attached form. These contracts will then be tabulated and lists of same distributed some time during the early part of November.

I trust you will let us have this information promptly so that we will be in a position to have this work completely finished up by November 6th.

Please note we would like the information with regard to contracts, whether such contracts are made direct with the contractors, consumers, or dealers.

It will not be necessary at this time to furnish us with any information in regard to contracts which expire on or before December 31st, 1915. (Vol. II, p. 999.)

This letter indicates that preparations were being made to launch the Protective Association, and that *it was desirable to know how much stock and how many orders each company would have on hand as of January 1, 1916*, to be used probably as a basis for representation or for the assessment of dues.

In November, 1915, Mr. Horner of the Nazareth Company wrote Mr. Morron concerning current reports that the Nazareth Company had largely increased its capacity by adding two kilns, stating that—

This seems so unfair I wish you to know the true conditions. (Vol. II, p. 715.)

Why should an official of the Nazareth Company consider it important that the president of the Atlas Company know the truth about the operations of his company unless there was some understanding between them? However, the report afforded Mr. Morron another opportunity to expound his views on the subject of production, viz.:

Thanks for yours of the 15th. I never pay any attention to rumors. Am glad you are not to operate the extra two kilns because if your company is run as ours we find it much sounder to regulate manufacturing in relation to our demand. There always has been a great temptation to run mills full, and I do not believe it is to the interest of public policy to do it.

We must not, of course, any of us, do anything that is without the spirit of the law, but good business sense is a thing each company should take into consideration. It is their duty to do it. As far as I am concerned, I expect to continue in this business, as I always have, in trying to regulate supply and demand as far as this individual company is concerned. (Vol. II, p. 715.)

On November 9 and 10, 1915, the president of the Lehigh Company entertained a number of gentlemen engaged in the cement industry at his estate near Allentown, Pennsylvania, in order that they might see some of the beauties of nature around Allentown. (Vol. II, p. 713.)

On November 4, 1915, a number of cement manufacturers held a meeting at the Machinery Club in New York. The minutes of this meeting show that lists of outstanding contracts as sent to each member by the secretary were discussed. (Vol. II, p. 716.) Therefore, the functions of an association were being performed whether the participating parties were organized or not. When this meeting adjourned, those present were invited to attend a further meeting at the Union League Club in Philadelphia, on November 18, 1915. The record does not show the nature of the business transacted at this meeting.

On November 19, 1915, a number of cement manufacturers held a meeting at the Hotel Raleigh in Washington, D. C. The exceedingly brief minutes of that meeting show that certain misunderstandings between mills in the South and mills in Maryland and the Lehigh Valley district were discussed. It was then decided that there should be frequent meetings for the dissemination of information regarding Trade Practices, and that the next meeting would be held in New York on December 14, 1915. (Vol. II, pp. 716-717.) The record does not show whether that meeting was actually held or not.

In November, 1915, Mr. Morron wrote from St. Louis to Mr. MacFarland, one of his assistants, in part as follows:

The main reason for my writing you this letter is because, in a talk which Mr. McConnell had with me yesterday afternoon, he related having been shown a memorandum of what he called some meeting held in Washington, of the southern manufacturers of cement and some others, as I recall it, in which your name appears, and Mr. McConnell stated to me that the record of that meeting as it had been shown to him was one that he felt sure I would not approve of, and that brought up to my mind a condition on which I have spoken to you a great many times and which I feel sure you fully appreciate, but I want to emphasize it again.

The Atlas Company wants to do anything it can legitimately to improve trade ethics. We have made changes in our terms to five cents a barrel so as to make it an inducement for dealers to handle cement as against other building materials. We are willing to do anything that is within the spirit of the law to straighten out bad customs, but the Atlas Company will not and must not take part in any conference which might be misinterpreted.

I know you feel just as I do on this, but it is a good deal like an automobile; it is not what you do yourself when you drive, but you have got to be on the lookout for what the other fellow does, and while you might not

have any intention of entering into any conference that would touch upon any matters other than those which we believe in, still if you take four, five, six, or a dozen men and put them together, somebody is liable to misinterpret it, and the Atlas Company is so staunch in its policy that I feel it necessary to write you this letter again so that you may be guided thereby.

Now, do not misunderstand me; I do not think you have done a thing you should not have done, but in the enthusiasm of some of these other fellows, you can not tell what they will report, and I do not want you to take part in any conferences of any kind that are not strictly in accord with our policy.

Furthermore, it seems to me that it would be the safest thing, even when you are talking over these ethics which we have a right to discuss, as I understand it, that you should have Mr. Cox or some lawyer there to take down the record of the meeting, so that there can be no misunderstanding, or that no one, after it is all over, can say that you were trying to do something which you really did not intend to do.

At the time of the investigation, about a year ago, of our company and others in the industry, I was perfectly frank in showing them everything and telling them the exact conditions, and the only danger that we are in at any time was what some other fellow said we were trying to do, not what we were really trying to do, and the strength of our

position was that I had a record of our intentions, and we were not depending upon somebody else's memory as to what was done.

This must have your very careful attention and you must handle the matter on those lines always and without exception. (Vol. II, p. 717.)

This letter indicates the ever present desire on the part of the president of the Atlas Company to make a record for the inspection of representatives of the Government who might be investigating the industry, and one that might be used as evidence in its behalf in case an action should be brought by the Government. This is a legitimate inference because one who knows he is walking on solid ground does not stop to warn a companion against quicksand. And if the president of the Atlas Company was so fully cognizant of the danger of the interpretation which might be put upon meetings between men in the cement industry, and that the action of one man might involve all the others in difficulties, why should he allow his company to continue to participate in meetings?

Upon receipt of the foregoing letter, Mr. Morrison's assistant proceeded to prepare for the files of the Atlas Company a memorandum, dated December 1, 1915, which reads in part as follows:

At an informal meeting of various eastern manufacturers at the Railroad Club held November 30th, I made the statement that from two recent letters I had received, I felt there might be a misapprehension as to the

exact position of the Atlas Company in connection with the handling of its business, and therefore wanted to state that we were always glad to furnish and receive statistical information of past performances and that we would be willing to do anything that was within the spirit as well as the letter of the law to correct bad customs, but that we would under no circumstances be a party to any arrangement that might be construed as having at any time a price understanding or agreement * * *. (Vol. II, p. 718.)

Further evidence of the precaution taken by representatives of the Atlas Company is contained in a letter dated November 30, 1915, addressed to the Bath Company:

I am at a loss to understand why this information is conveyed to me, as there might be construed the thought that there is some understanding between us, and perhaps you are under a misapprehension as to the exact position of this Company with reference to its Sales Policy, and that there may be no misunderstanding, we want to state that we are not interested in the details of your Company's sales any more or differently than we are interested in the sales of all or any one of our competitors.

We are, of course, always glad to know, as nearly as possible, the trade practices pursued by our competitors and their volume of sales and other statistics of past performances, but we will not under any circumstances countenance or approve of any

method that in the remotest degree savors of any understanding or agreement, such as your letter may be construed to assume. (Vol. III, p. 1109.)

In December, 1915, the president of the Atlas Company held a telephone conversation with the president of the Edison Company, and a memorandum of that conversation was placed in the files of the Atlas Company. This memorandum reads as follows:

President Morron stated to Mr. Mallory that *it was his understanding that the statistics compiled by Mr. Mallory showed the production in past years of the various plants, and that wherever he showed a minus sign it would indicate that the Atlas Company's average production for this year was less than its average production for the three years; and that wherever he showed a plus sign, it would indicate that the Atlas Company's shipments averaged greater than the average for the three years.* This information is valuable, as by these plus and minus statements he was able to determine Atlas volume of business. President Morron stated to Mr. Mallory that he felt that *at the recent conferences* some of those attending misinterpreted the object of the compilation of these statistics and have inferred that they were dealing with the price of cement, and that he had written Mr. MacFarland to that effect, instructing that he should not be a party to any further conference, because *some of those attending such conferences*

seemed to be impressed with and to convey the idea that they related to prices, which was not to be considered for a moment, and therefore we would not be a party to or take part in any way in any further conferences, nor would we be represented at any time or place with anyone except a chaperon be present, meaning an attorney. (Vol. II, p. 719.)

Here is a clear admission that they *were holding conferences, and that some of the manufacturers understood that those conferences related to prices.* Yet within two or three weeks after this memorandum was planted in its files, the Atlas Company assisted in the organization of the Cement Manufacturers' Protective Association.

That those conferences did relate to prices, and that the Atlas Company knew of that fact, and was a party to the tacit understanding is shown by a memorandum taken from the files of that company relating to the opening of bids submitted to the city of Worcester, Massachusetts, on July 15, 1916. This memorandum contained the following statement:

You will note that the only two manufacturers who bid direct *maintained the proper price.* (Vol. II, p. 719.)

In January, 1916, shortly after the organization of the Protective Association, Mr. Mallory, president of the Edison Company, wrote Mr. Morron, president of the Atlas Company, as follows:

At the meeting of January 14th of the Cement Manufacturers Protective Associa-

tion it was decided that statistics relative to the production, shipments, and stock on hand should hereafter be sent direct to the Secretary and compiled by him; and in accordance with this action *the December sheet* which is already in your hands will be the last sheet that I expect to compile. You will remember that at the time of the Association meeting at Baltimore I spoke to you, and you in turn took the matter up with Mr. Young, as to the matter of checking the statistics, and since that time I have personally expended \$135.65, covering the salary and expenses of the men doing the checking, also the printing and mailing of the sheets themselves, together with trips which it was necessary for me to make to the Tidewater, Whitehall, and Knickerbocker offices to obtain the statistics. (Vol. II, pp. 720-721.)

This letter shows conclusively that shortly *before* the organization of the Protective Association the manufacturers of cement in this section of the United States were collecting and exchanging statistical data.

The conduct of the officers of the Atlas Company in planting in its files correspondence and memoranda, and the testimony of Miss Mary K. Kavanagh correspond exactly, and each corroborates the other. Miss Kavanagh testified:

That she was employed by the Atlas Company November 4, 1904, and remained with them until April 16, 1920. She was first a stenographer in the Transportation Department for about eight months.

She then worked for Mr. Miner, comptroller of the company, the president's right hand man. She remained with Mr. Miner until 1911, when she began work for Mr. Holman, who was assistant to the president. She worked for Mr. Holman until 1920, but during his absence because of ill health she worked some for Mr. Burch and also steadily for Mr. MacFarland, who assumed the duties of Mr. Holman in his absence. Her office was between the offices of Mr. Morron and Mr. Holman. (Vol. I, p. 205.) She said that before the period of the world war the Atlas Company was visited from time to time by other cement manufacturers; that they would come in one by one and stay from ten minutes to half an hour, very seldom more than an hour; that they would go into Mr. Holman's room; that their visits would occur at least once a month, but all of them would not come each month. Those who came were Mr. Young and Mr. Swett of Lehigh; Mr. Coogan and Mr. Brown of Alpha; Mr. Mallory of Edison; Mr. Hilles of Dexter; Mr. Moyer and Mr. Lober of Vulcanite; Mr. Griffith of Giant; Mr. Smith of Lawrence; and Mr. Loeb of Coplay. *She removed certain correspondence out of the files and put it in a folder and gave it to Mr. Holman. That was just before the Government started an investigation. Mr. Holman said that they had a suspicion that the Government was going to make an investigation, and that she was to go through the files of the office and take out anything which she thought was of a damaging nature* (Vol. I, p. 212), as she

naturally knew what was damaging. She put it in a folder and put it on the center table in Mr. Holman's room. He took it out and went into Mr. Miner's room and she never saw it after that. Shortly afterwards the Government inspectors came, and she showed them where the files were, and they went through the files. With reference to when this occurred, on examination in chief, she said:

I think it was just before the war started, about 1913 or 1914. I think it was 1914, although I am not sure. (Vol. I, p. 207.)

She afterwards said in speaking of the World War that she meant after the United States got into the war on April 6, 1917. (Vol. I, p. 208.) On cross examination she stated that she gave those papers to Mr. Holman before the Government inspector arrived. As to the length of time, she said it certainly wasn't a week before. (Vol. I, p. 212.) And after being pressed as to dates because Mr. Holman was absent a great part of the time on account of his health she said:

I may have been mistaken about the year, but Mr. Holham did it personally. He was in the room. I can see him just now if I close my eyes. I remember him telling me to take out those papers. I remember putting the papers on his desk, and I can see him walking out of that room with the papers under his arm, going into Mr. Miner. I can see the whole thing. I have a very vivid recollection of things that are not honest. (Vol. I, pp. 213-214.)

And again speaking of dates she says:

I am not sure of my dates; I am sure of my facts, but not my dates. (Vol. I, p. 214.)

From a wire from DeWoody, one of the Government's agents who investigated the cement companies, to Mr. Bacon, then secretary of the National Association, and Mr. Bacon's answer (Vol. II, pp. 667-8) it appears that one investigation by the Government was in progress in December 1917; but it also appears that there had been a previous investigation in 1914. (Morron's letter to MacFarland, Vol. II, p. 718.) The removal of this correspondence shows why the information was so meager with reference to the situation existing prior to the organization of the defendant Cement Manufacturers Protective Association; and the frequency of the investigations by the Government indicates why Mr. Morron was so anxious to have the proper kind of correspondence and memoranda in his files.

IV

CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION

On January 6, 1916, the Cement Manufacturers Protective Association was organized. At that meeting a plan, constitution, and by-laws were ready to be adopted and were adopted, all necessary arrangements having previously been made for the Association to begin functioning immediately. The lack of information showing where and by whom the

preliminary work incident to the launching of this Protective Association was done was commented upon by the vice president of the Association at a meeting held in November, 1920, when he announced that he was trying to compile a history of the organization of the Association, and called attention to the fact that "the minutes of the organization meeting start right out without leading up to the organization of this association." (Vol. I, p. 613.)

Manifestly much preliminary work had been done which involved conferences, correspondence or phone calls, and quite a lot of stenographic work. Here again Miss Kavanagh and the circumstances shown are strikingly corroborative. With reference to the organization of the association and the papers relating thereto she testified:

That she remembered about the organization of the Cement Manufacturers Association. The Atlas Company had a great deal of correspondence in regard to it which was dictated by Mr. Holman. This correspondence extended over a period of several months, surely three or four. All the correspondence which related to the formation of the association she either sent to a certain one of the attorneys of the Atlas Company or he came after it, and that firm has the entire file relating to that matter. She doesn't remember when it was taken, but she put a slip of paper in the file which had the attorney's name written on it. (Vol. I, pp. 205-6.)

An attempt was made to discredit Miss Kavanagh on cross examination mainly by showing that

Mr. Holman was absent from his office a part of the time because of sickness, and could not have been present at the times mentioned by the witness. When the trial was had Mr. Holman was in Phoenix, Arizona; and he sent to Mr. Morron a telegram which the Government permitted to be introduced as a sworn statement. The telegram reads as follows:

First went to Loomis, December Nineteen Fourteen returned to New York November Nineteen Fifteen and left in one week for Arizona, returned to New York, April Nineteen Seventeen was there until August, Nineteen Nineteen then Saranac, was there three months then left for Arizona, returning New York, May, Nineteen Twenty One. (Vol. II, p. 1088.)

Clearly there is no inconsistency between the facts stated in this telegram and Miss Kavanagh's testimony. Holman was in his office in New York until December, 1914, and one week in November, 1915, and from April, 1917, until August, 1919. Therefore the papers which Miss Kavanagh took from the files because of their damaging nature could have been delivered to Mr. Holman immediately before the Government's investigation of 1914, or in or after April, 1917, as that investigation was being conducted in December of that year. And he could have dictated some of the correspondence relating to the organization of the association while in New York during November, 1915, which

was one month before the organization meeting was held. As a perusal of the minutes of the association will show, when present, and he was often there, he was the dominant figure among them. Absolute accuracy upon the part of the witness as to every detail can not be expected after five or six years had intervened, as there was no special reason to charge her memory with details. *Furthermore, no contradictory evidence was introduced with reference to either the stripping of the files of damaging documents and delivering them to Mr. Holman or to the delivery to counsel for the Atlas Company of the papers relating to the organization of the Association.*

The work was therefore done where one would expect to find it, *right in the office of the Atlas Company.*

The organization meeting was attended by representatives of 14 of the 19 corporations which are defendants in this case. The purpose of the meeting was stated by the chairman Mr. Lober, of the Vulcanite Company, as follows:

We all understand what we are here for. I was requested to call you here to consider the plan, *copies of which have been sent to you*; and the idea was to have you go over it carefully and I presume you have done that. . . .

Of course you understand *that the idea of this thing is cooperation and I think it is not necessary to say any more on that point.* We all agree that *the necessity of coopera-*

tion is acknowledged by everybody in the industry. The only question now we have to determine is how we can best make use of cooperation. . . . (Vol. I, p. 401.)

After some discussion the plan, constitution and by-laws were adopted by a unanimous vote. (Vol. I, p. 405.) The following are the parts of the plan, revised to January 1, 1921, which are of particular interest:

OUTLINE OF PLAN

The reasons stated as a justification of the organization are as follows:

Conspicuous among the evils from which every manufacturer of Portland Cement has long suffered have been certain notorious abuses arising from what amounts to fraudulent misrepresentation. The most common and flagrant instances are those which have to do with misrepresentation concerning contracts (known as "specific job contracts"), competitors' acts, and financial responsibility.

Although these abuses are too well known to require elaboration, it may be desirable to look at an illustration of each, with a view to determining whether it is practicable in a measure to correct them:

(1) It has become common, for example, in cases of jobs in fact involving the use of, say, a thousand barrels of cement, for purchasers to contract with each of several manufacturers for, say, two thousand barrels of cement to be used on that specific job. This

pernicious practice results in purchasers obtaining what, as a practical matter amounts to an option extending over a long period; and, in the aggregate, such options induced by, and based on misrepresentation, impose on the manufacturer one-sided, uncertain obligations covering a considerable portion of his output, frequently curtailing his business and resulting in loss.

It is apparent that such abuses could not exist if the truth were known. If the manufacturer knew the facts concerning the job, the amount of cement needed, whether his or some other cement was being used thereon, he would obviously be in a position to escape the disastrous consequences of such misrepresentations. The plan hereinunder outlined is designed to make the truth available and thus defeat misrepresentations and their consequences.

(2) The second form of misrepresentation is illustrated by the common experience of every manufacturer of Portland cement with statements made to him not only by dealers but often by his own salesmen concerning competitor's practices, with the result that the manufacturer is deceived and imposed upon. In the following plan it is not proposed to provide the fullest relief against such misrepresentations, because reports of outstanding or active offers or quotations may be objectionable, but it is proposed to give the manufacturer an opportunity of checking the representations of dealers and salesmen by including with the infor-

mation as to specific contracts, the price at which these past transactions have been closed, so that false statements may become less frequent.

(3) As to that kind of misrepresentations which have to do with credits, the plan explains itself. Here, again, the correction of the evils resulting from the misrepresentation is to be sought in making the truth available.

(4) In addition to the correction of these abuses by meeting misrepresentations with the truth to the extent indicated, the plan contemplates the giving of certain statistical information concerning the past, which has heretofore been available in less convenient form and is included because it may be included without much additional inconvenience to anyone.

(5) The plan further contemplates the compilation and publication of freight rates to relieve each manufacturer of the great burden of keeping track of this necessary information. (Vol. I, pp. 353, 354.)

CONSTITUTION.

ARTICLE I.—*Name.*

The name of the Association shall be
CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION.

ARTICLE III.—*Objects.*

The objects of the Association are the collection and dissemination of such accurate information as may serve to protect each

manufacturer against misrepresentation, deception, and imposition, and enable him to conduct his business exactly as he pleases in every respect and particular, free from misdirection by false or insufficient information concerning the matters following, to wit:

- (a) Information concerning credits.
- (b) Information concerning contracts which have been made for the delivery of cement, sufficiently complete to enable the manufacturer to protect himself against spurious contracts and like transactions induced by misrepresentation.
- (c) Information concerning freight rates on cement.
- (d) Statistical information as to production, *stocks of cement and clinker on hand*, and *shipments*. (Vol. I, pp. 355-6.)

ARTICLE V.—*Officers.*

Section 1. The officers shall be a President, Vice-President, Secretary, and Treasurer.

The Vice-President and Secretary shall be elected by the Association for such term as it may determine and may receive a salary, fixed by the Association. (Vol. II, p. 356.)

ARTICLE VIII.—*Freedom of Trade.*

No member of the Association shall enter into any arrangement, agreement, or understanding of any nature or kind whatsoever,

the object of which is to restrain trade, limit competition, or accomplish any purpose contrary to the spirit or letter of the law or contrary to the objects of the Association, as set forth in this Constitution, and membership in the Association shall be recognized as implying that the member is absolutely free to conduct his business exactly as he pleases in every respect and particular. (Vol. I, p. 357.)

BY-LAWS

SECTION 2. Vice-President.—The Vice President shall perform such duties in connection with the collection and dissemination of the information which it is the object of the Association to accomplish as may be assigned to his office by the Association.

* * * * *

SECTION 4. Secretary.—The Secretary shall keep a careful, full and complete record of all the meetings, discussions and transactions of the Association, give notice of all meetings of the Association, examine all bills, conduct the correspondence, collect, prepare and distribute the information contemplated by the Constitution as prescribed by these By-Laws, and perform such other duties as may be assigned to his office by the Association.

SECTION 5. Provision of Funds.—All assessments shall be fixed by a majority vote of the Association and distributed among and paid by the members pro rata according

to shipments during the preceding year from or into the territory covered by the service of the Association.

* * * * *

SECTION 7. Meetings.—The Association shall meet monthly, the time and place of each meeting to be fixed by the Association. Special meetings may be called whenever the President shall deem it necessary or upon request of five (5) members. A majority of all the members shall constitute a quorum.

* * * * *

SECTION 8. Collection and Distribution of Information.—On or before the fifth day of each calendar month each member shall forward to the secretary the following:

(1) A statement of all accounts outstanding sixty (60) days or more and unpaid, giving the name and address of the debtor, total amount unpaid, and the time overdue specified by months.

A statement of all bills receivable, on hand, giving name of purchaser, amount, date payable, and detail of account covered by note.

A list of accounts in attorneys' hands for collection.

(2) A statement of contracts which have been made and are in effect on the last day of the preceding calendar month, giving the following information with respect to each contract, namely, date of contract, the purchaser, the consumer, a full description of the work upon which the cement is to be used, the amount contracted for and the

amount yet to be delivered, the price, and the expiration date of contract. In addition to the foregoing monthly statement of contracts, as contracts are made during the month, the Secretary shall be notified as soon as possible.

(3) A statement of all contracts cancelled or reduced in amount during the preceding month.

(4) A statistical statement of production and shipments during the preceding calendar month and stock of cement and clinker on hand on the last day of the month.

Upon the receipt of the foregoing monthly statements, the Secretary shall forthwith put all the information contained therein in convenient form as directed by the Association and distribute the information thus prepared to the members reporting.

The Secretary shall also transmit the information thus prepared to the person performing corresponding duties in any other association, collecting and distributing like information within the purview of the Constitution, and receive and distribute to the members of this Association such information transmitted from such other association, as may be from time to time directed by this association.

The Secretary shall prepare and distribute among the members a complete schedule or schedules of freight rates, on cement, giving the rates for rail, water, and rail and water shipment. Each member shall from time to time notify the Secretary of all

changes or other facts of importance connected with such rates. The Secretary shall immediately advise all members of changes in freight rates by issuing supplements, revisions or otherwise, as may be most convenient. (Vol. I, pp. 358, 359.)

LOCATION OF OFFICE

Those present at the organization were conscious that the assembling together of competitors was unusual, and would naturally excite the suspicion of those having knowledge of such fact.

In the course of the discussion as to when and where the second meeting of the Association would be held the following remarks were made:

Mr. MORRON (Atlas): Just one thought, on that, Mr. President. I am wondering whether having the meeting in this Club is a particularly good thing. You come in contact with people with whom you are doing business, who might misinterpret it to some extent. A great many men that you do business with are members of this Club, and it seems to me that that might be misconstrued by some who are always willing to misconstrue things. If they saw a great big group of cement men coming into this Club constantly—

The CHAIRMAN (Vulcanite): How about a hotel?

Mr. MORRON: I should say that until you have some regular place to meet, a hotel would be a better proposition. . . .



Mr. YOUNG (Lehigh): I do not think it would be a bad stunt at all to have your meeting up at the Biltmore. *We are accustomed to going there, and we could get one of the rooms upstairs and serve a light luncheon, as we generally have at the Association meetings.*

President GRIFFITH (Giant): That was my idea. (Vol. I, p. 409.)

The second meeting was held at the Biltmore Hotel. (Vol. I, p. 411.) Mr. Brobston (Dexter) suggested that the office of the Association be located at Bethlehem, Pa., which brought forth the objection from the Chairman (Vulcanite) that the office would "be rather conspicuous in a place like Bethlehem."

Mr. Morron (Atlas) favored New York City, where counsel would be convenient "and we are sort of swallowed up in the great big life around us." (Vol. I, p. 410.)

V

EFFORTS TO ENLARGE MEMBERSHIP OF ORGANIZATION AND TO FORM WORK- ING RELATIONSHIP WITH OTHER AS- SOCIATIONS

It was believed by the members from the beginning of the organization that its success depended upon the relative number of the manufacturers within the territory that belonged to the Association, upon the degree of cooperation among the

members, and also upon the extent of the cooperation between this Association and the associations organized for contiguous territory. This is shown especially by discussions which were from time to time had in their meetings, and also by correspondence. Thus in the organization meetings, Mr. Bayle (Glens Falls) inquired whether any particular number had signified their intention of joining the organization. The Chairman stated that it was taken for granted that all present had so signified their intention; that the Alsens Company had promised to have a representative there; and that the Bath people had submitted the plan to counsel, and would be governed by his advice. Inquiries were made of the Chairman if he had heard from the Knickerbocker or Helderberg, and he said he had not heard from the Helderberg. It was stated that the Nazareth would also join. Mr. Bayle then said:

It is very important to get those in. . . .

Mr. BAYLE: I think, Mr. President, it would be also necessary that the newly-elected officers should try to see the companies that are not here represented, and get them in here. One or two companies staying out might destroy all the good work the rest of us might do.

The CHAIRMAN: Mr. President, will you take that up with the Knickerbocker and the Helderberg?

President GRIFFITH (Giant): Yes, sir. (Vol. I, pp. 408-409.)

At the meeting held January 14, 1916, Mr. Brobston (Dexter) said:

In that connection, Mr. President, I understood the president was to appoint a committee to see the representatives of those companies who were not present at the last meeting and the secretary sent out notices not only to those who were present at the last meeting but to all of the companies in the Lehigh Valley District and Maryland District and the New York State District. Under those circumstances I might give you a list of the companies to whom notices were sent and the president could report as to the status of the companies as their names are called.

And then a list of companies that were not represented was gone over, and the members stated what was known about their intention to join. (Vol. I, p. 411.) At the same meeting the president asked:

Is it the feeling of the members that we want to go to the southern mills and ask them to join us in this Association?

Mr. WEAVER (Allentown): Will they file their contracts with us just the same as the western association?

Mr. SWETT (Lehigh): The same as the western.

Mr. COOGAN (Alpha): I think they could become affiliated with us.

And the president inquired whether it would be satisfactory for them to organize an association of their own and report their contracts as an associa-

tion, because it would be difficult for them to meet with this association.

Mr. SCOTT (Giant): In that case I think we would consider the idea of affiliation with those southern companies.

Mr. WEAVER: You would probably join a southern association?

Mr. SCOTT: I think we would join the southern companies. (Vol. I, pp. 413-414.)

And there was an extended discussion relative to the southern companies, in which the following views were expressed:

Mr. BROBSTON (Dexter): Mr. Chairman, I don't think that it would be of advantage to have the mills south of the Virginia line in this Association.

This is a homogeneous Association, one where the information that is got for one is gotten for all of us; and I think it would be very much better for the mills south of the Virginia line if they would have their own Southern Association.

Mr. SWETT (Lehigh): I agree with you, Mr. Brobston, I think the southern mills should have their own association because *they will want to come in and affiliate with the Western Association and the Eastern Association just as we have now with the Western Association and have an exchange of information.*

Mr. SCOTT: Personally, I agree with Mr. Brobston. *The business of this entire plan is the matter of exchange of information*

and we cannot accomplish very much if a few of us file the information and the rest of us not do so. (Vol. I, p. 415.)

The president (Giant) said:

It seems to me that it would be in order for us to see if we cannot stir up the southern mills, and get them to form an association along the same lines as ours and as is formed also by the western people, and we would be then, as Mr. Scott expresses it, in the position of the "Three Musketeers." (Vol. I, p. 416.)

In the same meeting, Mr. Swett (Lehigh) said:

As to the manufacturers that are not members of this Association steps should be taken immediately to interest them in the Association and there ought to be someone delegated to attend to that. (Vol. I, p. 418.)

At the meeting of January 31, 1916 Mr. Coogan (Alpha) said that Mr. Bayle (Glens Falls) had explained to him that until such time as the status of the other New York mills was clearly defined he would not care to report his contracts. Mr. Cover (Security) stated that that was the reason why the Security had not so far filed its contracts; and that he was ready to come forward and bring everything up to date the minute the other companies joined the association and did likewise, but that was the only condition under which his company would come in at that time; and he expressed a doubt whether his company should remain in the

association under those conditions and receive its benefits; but the president assured him that his position was understood, and that they were willing to furnish his company the information without its contracts being reported. (Vol. I, p. 440.)

On March 25, 1916, Mr. Brobston (Dexter) wrote Mr. Griffith, president of the Association:

I acknowledge receipt of yours of the 24th inst. My only idea in writing you was that it was not fair for the Nazareth Company to have reports of our contracts and credit reports if they did not reciprocate and it seems to me that they have now been given enough chance to see what the benefits of belonging to the Association will be and we, therefore, until they actively take part, think they should not receive any further reports.

I am glad to note that you expect the Alsen's to come in. I think it is worth while to continue working on the Helderberg as we can get Glens Falls the minute the Helderberg comes in. We will always keep on working with Horner and trust that he will eventually come in line. (Vol. II, p. 650.)

At the meeting June 19, 1916, in discussing the relationship with the western association, Mr. Griffith (Giant) said:

I feel it is very valuable for this Association and the members of this Association to have the information from the Western Association as there are a great many points

the Eastern Mills ship into that are close to their mills, and we should know what is going on—what has been going on in their territory. It is the feeling of the members, we will ask them to make their report at the next meeting after the thing is definitely settled, as the Western Association has just been formed. The same committees were asked to take up with the Universal the filing of New England contracts. (Vol. I, pp. 494-495.)

At the meeting of August 21, 1916, the president told about a conference of the committees appointed by the Mid-West Bureau and the Cement Manufacturers Protective Association, in which the best methods of interchanging information was considered, and said it was decided that as soon as the Mid-West Bureau had made necessary amendments to its by-laws a conference would be arranged between the attorneys of the two associations. The following colloquy then occurred:

The PRESIDENT: I think it very essential that all the eastern members should have the same information as compiled by the Secretary of the Mid-West Association.

Mr. ISRAEL: All it requires is, that the Western Association should amend or change its by-laws, in order to give information to one that is not a member of that Association, namely, to our Association?

The PRESIDENT: Yes.

Mr. ISRAEL: When they have done that, then, in fact, it will be perfectly legal to exchange information?

The PRESIDENT: Yes.

Mr. ISRAEL: That will be very satisfactory.

The PRESIDENT: And they will give us sufficient copies of their contracts, credit reports, et cetera, after their by-laws are changed, so that each member of this Association shall receive same. (Vol. I, p. 501.)

At the meeting of the Credit Managers' Branch on October 16, 1916, there was read a letter from the Association's counsel in which he reviewed the objects of the two associations, and stated the result of his conference with the attorney of the Mid-West Bureau. In this letter he said:

The arrangement made (subject, of course, to the approval of the two Associations) was that the Secretary of the Mid-West Association and the Secretary of the Protective Association should send each other a sufficient number of their respective reports in the form each Association uses for distribution to the members of the other Association. Thus, a member of the Protective Association will receive from its Secretary precisely such information collected by the Mid-West Association as a member of that Association receives from it; and a member of the Mid-West Association will receive from its Secretary precisely such information from the Protective Association as a member of the Protective Association receives from it. (Vol. I, pp. 513-514.)

At the meeting of the Credit Managers' Branch on February 19, 1917, a motion was passed to thereafter send to the Secretary of the Mid-West Association a copy of the minutes of the meetings of the Protective Association. (Vol. I, p. 522.)

On March 10, 1917, the Sales Manager of the Clirchfield Portland Cement Corporation addressed a letter to the president of the Association in which he submitted his resignation and expressed the hope "that we will be able to perfect the organization of a little Protective Association in the South next week." And he added:

In doing this, I want to express my full appreciation of the great amount of good that is derived from membership in your organization. I want to compliment those of you who have worked so hard to perfect the organization, and to carry out the ideas that originated in the Association. I am not unmindful of the good that we have derived, and the enthusiasm instilled into me, I believe, has done more to cause the creating of a similar organization in the South than any other one thing. (Vol. I, p. 524.)

At the regular meeting of February 20, 1919, a long discussion occurred with reference to members of the Protective Association also becoming members of the Southern Association. It appeared that the Southern Statistical Bureau had sent out a circular letter in which they had requested that mills shipping cement into that territory pay them

certain dues and join the Southern Association; and the discussion related to whether the members shipping into that territory should be permitted to belong to both associations; and, if so, whether their reports to the Protective Association should be limited to sales made within its territory. Mr. Moyer (Vuleanite) said:

I do not think it is desirable for companies having no mill located in the Southern territory to split up their statistics between this association and some other association. I would not think it would be desirable for the Vuleanite Company to be a member of the Eastern Protective Association and the Mid-West Protective Association and report to them shipments into Ohio and not report those shipments into Ohio to this association. It destroys the value of the statistics to the Eastern Association. It seems to me that protective associations are organized along the line of grouping of mills; that all mills grouped in the South or on the borders of the South are grouped into the Southern Association; those in the Mid-West in the Mid-West Association; and those in the East, in the Eastern Association, all placed along those lines. I do not think we ought to upset that plan. (Vol. I, p. 589.)

Mr. Swett (Lehigh) said that the Southern Association was "evidently going to run their association along the line we are here, checking up the contracts," and that he thought any concern that

shipped a volume down in the southern territory should belong to that association and stand some of the expense. (Vol. I, p. 589.)

At the meeting of March 20, 1919, the chairman said that at the last regular meeting the question was brought up in regard to interchanging information and statistics with a proposed association comprising the mills in the South Atlantic States, that association to be built along the lines of the Protective Association, and that he was authorized to appoint a committee to consider what dues should be paid that association by members of the Protective Association shipping into that territory, and where the dividing line should be. (Vol. I, p. 592.)

Mr. Holman (Atlas), Chairman of the Committee so appointed, stated that he had written a letter to Mr. Dickinson, a member of the Mid-West Association and Chairman of its Auditing Committee, in which he stated that if an association was formed in the South along the lines of the Protective and Mid-West Associations, one which counsel would approve and would authorize the exchange of information with, the Protective and Mid-West should contribute a sum of money towards the expense of operating such Southern Association, and allow both the Protective and Mid-West Associations to proceed without withdrawing any tonnage reported to either Association and reporting it to the Southern Association, and that

counsel had advised he would approve such an arrangement if satisfactory details could be arranged; as "such a plan would enable exchange of information among the three associations based upon no changes in the present membership." (Vol. I, p. 593.) Mr. Holman further reported that Mr. Dickinson had replied that he had presented the matter to the members of the Mid-West Bureau at their regular meeting on March 14, and that a motion had been passed authorizing the Chairman of the Bureau to enter into negotiations with the proper parties and giving him "*power to take what steps are necessary in order to secure the cooperation and coordination of the three associations, along the lines suggested in your letter*"; and that he, Mr. Dickinson, would be glad to make such arrangements as would be satisfactory to all concerned "with a view to the exchange of information between the Southern Association and our respective organizations following the formation of the Southern Association along similar lines to ours, which would meet with the approval of our respective counsel." Mr. Holman further stated that he understood that the proposal had been accepted subject to the working out of the details satisfactory to them and the Association. The Chairman then said:

The matter seems to me to be up to the Southern Association now, as the Mid-West and our Association are apparently in

accord in the matter, and I think it would be well for us to adopt a similar resolution to that adopted by the Mid-West and to keep this Committee intact to work out any further details with the Southern Association when it is properly formed, then we can go ahead, based upon their willingness to meet the views of this Association and the Mid-West, subject to the proper formation of their Association, which will be decided by Mr. Cox at the proper time. (Vol. I, pp. 593-594.)

The motion of the Mid-West Bureau was then read and Mr. Twamley (Coplay) said:

I offer a similar resolution that the committee of six members that has been appointed by you be empowered to conduct negotiations along the lines suggested in the Mid-West resolution;

which motion was carried. (Vol. I, pp. 590-594.)

The minutes show no further action upon the matter; but as both the Mid-West Bureau and the Protective Association had appointed committees, with full power to act, it is a fair inference that the relationship contemplated was established with the Southern Association. *And thereby arrangements were perfected for close cooperation, and the exchange of full information with reference to the entire cement industry and the minute details of their business between nearly every manufacturer of cement within the entire territory extending from the Mississippi River to the Atlantic Coast.*

How completely members of the defendant Association dominate the industry in the eastern section of the United States is shown by Government Exhibit No. 242 (Vol. II, p. 664, side p. 1296), which was issued by the National Association and purports to give the capacities of all the mills in the United States in the year 1920. From that exhibit it appears that the mills belonging to the members of the Association have about 95% of the total capacity of all mills located in the territory covered by the Association.

VI.

CONTROL OF PRICES AND PRODUCTION
(1) BY THE USE OF SPECIFIC JOB CON-
TRACTS, (2) BY THE ASSOCIATION'S
SYSTEM OF REPORTING, AND (3) BY
THE EMPLOYMENT OF CHECKERS TO
SPY OUT THE USE OF CEMENT SOLD
ON SUCH CONTRACTS AND DETERMINE
WHETHER THE QUANTITY SPECIFIED
WAS EXCESSIVE.

Before it can be intelligently discussed whether the reasons assigned in the constitution justify the Association's existence, it is necessary to know what the practices engaged in by and through the Association are, and the relationship between those practices and the cement industry. There should be kept in mind the two classes of sales heretofore mentioned, to-wit, one of cement to dealers for the general trade, which, according to Mr. Morron (Vol. I, p. 330), "they sell out in wagon-load lots, or something of that kind," and which is from 60 to 65 per cent. of the entire trade, and the other of cement to be used on special jobs. Of the latter class two-thirds or more is sold through the dealers; but for all sales, whether made through a dealer or directly to the contractor, contracts having the same provisions are used, the dealer, of course, being allowed his differential when the sale is made through him. Because cement will deteriorate

when exposed to bad weather and often when left too long in the air (Elliott, vol. I, p. 148; Morron, vol. I, p. 338), it is purchased by dealers for the general trade *only as needed to meet the immediate demand*. There is no restriction on the quantity that can be bought for immediate delivery (Lockwood, vol. I, p. 184), but the following testimony of Merriman, a dealer of Scranton, Pennsylvania, with reference to contracts for future delivery *for the general trade* is especially important:

A blanket contract as I interpret it is a contract that provides for a certain amount of cement to be taken in a specified time, *but to be used where you choose to place it*. There was a time when I could get a blanket contract. That is several years ago. *I can't get a blanket contract from any company. They have cut out that practice of giving blanket contracts in the neighborhood of fifteen years ago. They have not been allowing it since that time.* (Vol. I, p. 176.)

In other words, while there is no restriction as to the quantity of cement that the dealer can purchase for immediate delivery, yet he cannot buy for future delivery *for the general trade*; and, as the dealer cannot keep it in storage for a substantial length of time, all cement purchased in the general trade must be bought and sold at the current market price; and the price at any time in the future cannot be affected thereby; and also, the dealer is cautious as to the quantity ordered, and there is no probability of the cement market be-

coming oversupplied. But it is entirely different with reference to cement sold for delivery six, eight, or twelve months in the future, as is done to contractors and builders and large consumers for specific jobs. (Vol. I, Kelter, p. 189.) It is necessary for a contractor to know that he can obtain the cement when needed, and also, that he may figure intelligently his bid for a job, the price he will be required to pay. As two-thirds or more of the cement shipped for specific jobs passes through the hands of dealers, in the absence of some restriction, if a dealer should believe that the general demand for cement would increase and the price be advanced, through these contracts he could contract for cement for future delivery at the price prevailing when the contract is made. And, if a substantial quantity of excess cement should thus be contracted for, the cement so obtained would come in competition with that manufactured and sold for the general trade *at such future time*, and the manufacturers would thereby lose control of the market. Therefore, as a complement to the abolition of the blanket contract under which dealers could buy for future delivery cement for the general trade, there was introduced what is known as the specific job contract which alone is used in the sale of cement to be used on specific jobs.

SPECIFIC JOB CONTRACTS.

According to this record every member of the Association uses, in selling to contractors and builders

and large consumers for special purposes, and to dealers cement to be furnished to such customers, specific job contracts. In fact, it appears to be a custom of the trade, but precisely when it arose and why it should exist defendants do not attempt to explain. Because it does exist, it is assumed to be entirely proper; and then it is further assumed that any conduct is legitimate that is necessary to control, or helpful in controlling, the production and price of cement by taking every advantage of the exact terms of the contract.

Special attention is given to trade practices by the National Association; and that organization is largely responsible for the adoption and maintenance of many uniform practices. In Government Exhibit No. 243 (Volume II, following p. 664), a pamphlet entitled "Trade Practices in the Cement Industry," published in January, 1919, on pages 9 and 10 appears the following under the heading "Contract Form for Dealers' Use":

Great demoralization results from the ability of dealers to place orders with manufacturers for large amounts for deferred delivery upon the representation that the cement is for specific work which the dealer has sold, all or part of which has in reality not been sold by dealer for such work. In such a case the cement is later sold by dealer from time to time when the market has advanced at a price lower than warranted by the manufacturers' current prices to such dealer and lower than other dealers in the

same town can sell at, based on manufacturers' prices to them for current requirements. This results in demoralization to the detriment of all manufacturers concerned in the market affected—the manufacturer who has such an unspecific contract delivering cement at prices below prevailing market prices, and the manufacturers who are trying to sell through other dealers being unable to secure business because of the disadvantage under which such dealers are placed in competition with the dealer who is being supplied by the other manufacturer at price below prevailing market.

Urging dealers to place orders for extended delivery for specific work, and permitting such dealers, at their option, to take more or less cement on such orders than actual quantity used in the work, *has been one of the most objectionable devices and practices known, and has done more than any other one thing to bring about demoralization.* This practice is closely akin to to "guaranteeing prices against decline", and no good or wise merchant ever resorts to such practices. If a contract is made it should be a fair one and its terms observed by both parties.

No specific work contract should be made that is not bona fide, and such a contract should cover the quantity of cement used in the particular job described—no more, no less; and any change in the market during the period of the contract should not affect

the price named in the contract. All specific work contracts with dealers should be in written contract form, and dealers should be required to report monthly their deliveries thereon. These suggestions, if consistently followed, will prevent padding of contracts and the loss and demoralization resulting therefrom.

If all manufacturers insist that every specific work contract with a dealer have attached thereto an executed copy of contract between the dealer and his customer for that particular work, it will largely eliminate the abuses recited.

For these reasons the attached form of dealer contract should be adopted and its use by dealers insisted upon and executed copy of the dealer contract be attached to the manufacturer's specific work contract with that dealer in every case. The manufacturer, of course, when he has any reasonable doubt of the existence of the specific work mentioned, should make a thorough investigation to disclose the fact or establish with certainty that the quantity in the dealer contract is correct. (See Form No. 5.) (The italics are theirs.)

To this pamphlet there were attached a number of forms, the fourth of which was a suggested form for "Specific Work-Sales Contract." This form contained the following clause:

in consideration of the price and subject to all the terms, conditions and limitations set forth on this and the reverse side hereof,

which it is hereby mutually understood and expressly agreed are a part hereof, SELLER hereby sells and agrees to deliver, and the BUYER hereby purchases and agrees to receive and pay for approximately barrels of "IMPERIAL" Portland cement, at a price of \$ per standard bbl. in 4 cloth sacks, in carload lots, f. o. b. cars , to be used in the following described work, and shipped between the date hereof and , 191 .

DESCRIPTION OF WORK

This contract is intended to, and does, within the limitations hereof, cover the entire quantity of Portland cement which BUYER shall, during the time herein specified, furnish or use in the work above described.

The amount of Portland cement required for the said work is estimated by BUYER at barrels, but nothing herein contained shall obligate SELLER to furnish hereunder more than the quantity of "IMPERIAL" cement actually furnished by BUYER for, and used in, said work. (Vol. II, p. 664, G. E. 243, Form 4.)

The fifth form was "Contract Form for Dealer's Use" and contained the following clause:

Quantity: This contract is intended to, and does within the limitations hereof, cover the entire quantity of Portland cement, which BUYER shall, during the time herein speci-

fied, use in the work above described, estimated at _____ barrels, but SELLER is not obligated to furnish hereunder more than the actual quantity of "IMPERIAL" cement actually used during said period in said work. (Caps and italics theirs.)

The section above quoted appeared in the "Trade Practices" published in 1916, and forms containing the same clauses were attached thereto; and a similar section, but not in the exact words, was in the Trade Praetices published in 1915, and to it were attached forms containing the same clauses. (Gov. Exhibits 244 and 245, Vol. II, following p. 664.)

The above quoted clauses or their equivalents are used in all of the defendants' specific job contracts. Under those contracts it is not at all improper for the purchaser to obtain and the manufacturer to deliver more cement than is necessary to complete the job described, or for cement to be delivered and accepted for use on some other job. It is simply provided that the seller is not "obligated" to furnish more than the quantity necessary for the job.

The attitude of the defendant manufacturers towards their dealers and other customers, as indicated in this record, is, to say the least extraordinary. It is hardly believable that it is real. To so believe is a greater reflection upon them than to believe that it is merely pretended for the purposes of this litigation. The pretense is that their cus-

tomers have no proper sense of honor in respect to their contractual obligations; that they will observe their contracts, if it be to their interest to do so, but, if otherwise, they treat them as mere waste paper. And they would have it believed that those who purchase cement are so financially irresponsible that a contract can not be enforced against them. Therefore, throughout the record contracts with dealers and contractors are spoken of as one-sided—perfectly good as against the manufacturers, but worthless as against the purchasers. And it is assumed as an incontrovertible fact that the purchaser perpetrates a fraud upon the manufacturer if he manages to *procure and pay for* more cement on a contract than is used on the job described. That is, if a contractor happens to be engaged in building at the same time a schoolhouse and a churchhouse, and obtains some cement under the schoolhouse contract and uses it in the construction of the churchhouse, he has perpetrated a fraud upon the manufacturer, *though he pays for the cement the contract price*. It is to protect the manufacturers against such frauds as that, and to prevent them from being defrauded in a similar manner by a dealer or contractor making contracts to procure cement for the same job with more than one manufacturer and thus procuring more cement than is sufficient to complete the job, that they have organized the elaborate system operated by the Association.

The contract for future delivery generally used in commercial transactions obligates the seller to deliver, and the purchaser to accept the goods at the time, place and price specified. If either party breaches the contract, he is liable to the other in damages. There is nothing in this record to indicate, and there is certainly no reason why the court should judicially assume, that the dealers in building materials and the contractors who construct the great highways, bridges, tunnels and buildings which touch the sky are financially less responsible than those who engage in other lines of business. Then there must be some special reason why cement manufacturers uniformly use this specific job contract, and are so anxious to see that no cement is delivered thereunder other than the quantity necessary to complete the work described.

As above explained, that reason is, if dealers could procure cement for the future general trade at current prices, the cement so obtained would come in competition with that manufactured and sold in the general market at such future period. Therefore, the object of the specific job contract and its strict enforcement is to enable the manufacturers to retain absolute and continuous control of the market. Succinctly stated, therefore, the principal excuse assigned for the existence of the Association is to enable the manufacturers to prevent the users of cement from obtaining a greater quantity, though paid for, than is necessary to meet their actual current needs. And the primary object intended to be accomplished was to pre-

vent the delivery of more cement under a specific job contract than is necessary to complete the job described, thereby enabling the manufacturers at all times to control the price of cement, and by exchange of information and intimate association to prevent competition among the manufacturers as to its price.

Let us see if the defendants are not entitled to a grade of 100 in the accomplishment of this purpose.

REPORTS AS TO SALES ON SPECIFIC JOB CONTRACTS AND PRODUCTION AND SHIPMENTS.

The exchange of information relating to production and shipments of a commodity, and especially to sales and prices at which made, is one of the most efficient means of regulating production and advancing and maintaining prices, and one that is used by all open-price associations.

It is doubtful whether any more complete system of reporting could be devised than that used by defendants.

The following are the forms used for reporting specific job contracts, production of clinker and cement, and shipments of cement. They are fully explained by Miss Phalen, Secretary of the Association in Volume I, pp. 154-161, of the record. For convenience of inspection the more important ones are reproduced:

Form #20.—Used by manufacturers in reporting to the Association full data concerning specific job contracts.

Form 20

From	192	
Contract No.	Dated	
Purchaser		
Address		
Work, as described on the back hereof		
Location		
Contractor		
No. bbls.	Price	Del. pt.
Date of Exp'n		

Give full and complete description below of the work, viz.—if a building give dimensions, character of construction, etc. If paving state what kind, giving yardage, thickness, mix, etc. Give exact locations and make description specific. (Gov. Ex. 14, vol. 1, p. 360.)

Form #21.—Used by manufacturers in reporting to the Association changes made from time to time in specific job contracts previously reported on Form #20.

Company	Form 21
Contract Number	Date
Delivery Point	

1. Completed	<input type="text"/>	Bbls.
2. Canceled		Bbls.
3. Decreased		Bbls.
4. Increased		Bbls.
5. Leaving balance due		Bbls.
6. Date of expiration extended to		
(over)		

Instructions

First—Whenever entire amount of contract has been shipped, check only (v) in space opposite "Completed" (line 1).

Second—If entire amount due on contract is canceled enter number of barrels canceled on Line 2.

Third—If portion of contract is canceled, state number of barrels cancelled on Line 3 and balance still due on Line 5.

Fourth—If amount of contract is increased state number of barrels of increase on Line 4 and balance still due on Line 5. (Gov. Ex. 15, vol. 1, p. 360.)

Form #7.—A *daily* report compiled by the Association from data reported on Form #20 and distributed to its members showing the contracts obtained by each member, the purchaser's name and address, the point of delivery, a description of the work, the brand of cement purchased, the delivered price, and a symbol indicating the nature of the job on which the cement is to be used. (Gov. Ex. 16, p. 360, Side p. 654.) See folder opposite.

Form #8.—Compiled *daily* by the Association and distributed to its members, showing the number of new contracts received as of that day and to date from the first of the month, the number of barrels ordered as of that day and to date, the number of contracts canceled as of that day and to date, the number of barrels canceled as of that day and to date, reinstatements and increases as of that day and to date, and the decreases as of that day and to date. (Gov. Ex. 17, p. 360, Side p. 655.)

Form #22.—Used by manufacturers in reporting to the Association at the end of each month a list of all active specific job contracts, showing the balance due in barrels at the end of the previous month and the balance in barrels remaining due at the end of the current month. (Gov. Ex. 23, vol. 1, p. 364, Side p. 662.)

Form #13.—Issued monthly or quarterly by the Association to its members and showing as to each of the member-companies its percentage of commitments on a given date as compared with shipments for the past 12 months. (Gov. Ex. 24, vol. 1, p. 365.)

Form #9.—A monthly summary and cumulative report of information distributed daily by the Association on Form #8, showing as to each member the new contracts, contracts canceled, reinstatements and increases, and decreases during the preceding months of the current year. (Gov. Ex. 25, not printed, but see Gov. Exs. 405-428, vol. II, p. 706. Side pp. 1463-1468½.)

Form #10.—Quarterly report by Association of all specific job contracts on file with member companies, showing name of contractor, delivery point, full description of work, brand sold, date contract was closed, date of expiration of contract, number of barrels sold, price at which sold, the quantity shipped since last report, total shipments to date, and the balance to be shipped. (Gov. Ex. 26, vol. 1, p. 364. Side p. 665.)

Form #11.—Issued by the Association monthly and showing by States the commitments of each company, in barrels, and the total commitments of each company. (Gov. Ex. 27 not printed, but see Ex. 429, vol. II, p. 707, side p. 1469-1471.)

Form #23.—Used by manufacturers in reporting monthly to the Association the quantity of clinker produced, cement ground, cement shipped, clinker in stock, and cement in stock. The importance of this report warrants its reproduction here:—

Form 23

Cement Manufacturers Protective Association
Following are the Statistics of The

Co

For the month of February, 1921

Clinker Produced

1st 2 months of 1920	Bbls.
1st 2 months of 1921	Bbls.
February 1920	Bbls.
February 1921	Bbls.

Cement Ground

1st 2 months of 1920	Bbls.
1st 2 months of 1921	Bbls.
February 1920	Bbls.
February 1921	Bbls.

Total Shipment

1st 2 months of 1920	Bbls.
1st 2 months of 1921	Bbls.
February 1920	Bbls.
February 1921	Bbls.

Stock on Hand

Clinker January 31st, 1921	Bbls.
Clinker February 28th, 1920	Bbls.
Clinker February 28th, 1921	Bbls.
Cement January 31st, 1921	Bbls.
Cement February 28th, 1920	Bbls.
Cement February 28th, 1921	Bbls.

Note: Please fill out and return to this office
by March 4th, 1921.

19 West 44th Street,
New York, N. Y.

(Gov. Ex. 28, vol. 1, pp. 365-6.)

Form #12.—Summary report issued monthly by Association based on reports made to Association by members on Form #23 and showing as to each member the quantity of clinker burned, cement ground, cement shipped, clinker in stock and cement in stock, etc., and showing the percentage of increase or decrease as compared with similar months and periods in the preceding year. This report also shows the number of barrels shipped by one company for the account of another company. *It is impossible to adequately describe this form, and it is too complicated to reproduce here. It must be seen to be fully appreciated.* (Gov. Ex. 34, vol. 1, p. 366. Side p. 679.)

Form #30.—Issued monthly by Association and showing by chart or picture the same information shown in figures by Form #12. (Vol. 1, p. 161.)

Form #24.—Used by manufacturers in reporting to the Association semimonthly their total shipments, both on specific contracts and to dealers (Vol. 1, p. 159), during the preceding 15 days, and also showing for the purpose of comparison the quantity shipped during the corresponding period of the preceding year. (Gov. Ex. 57, vol. 1, p. 367.)

Form #14.—This is a summary report issued by the Association, compiled from information received upon Form #24, showing comparatively the total shipments by each company during 15-day periods during the current year and the preceding year, and the percentage of increase or decrease in the shipments of each member. (Gov. Ex. 58, vol. 1, p. 367.)

Form #31.—Issued monthly by Association and showing by chart or picture certain information reported on forms Nos. 15-18. (Vol. 1, p. 161.)

Form #28.—Issued quarterly by the Association to its members and analyzing contracts to show commitments and shipments on various classes of construction by States, total shipped to date and the unshipped balance. (Gov. Ex. 67, vol. 1, p. 371. Side p. 709.)

On behalf of defendants special attention is called to the fact that the reports of sales do not include those made to dealers for the general trade; and Miss Phalen testified on cross-examination that—

The activities of the Association in connection with contracts are limited strictly to these specific job contracts, and the Association has nothing to do with other transactions of the manufacturer, nothing to do with three-quarters of his business during 1920, and more than two-thirds of his business during 1921. (Vol. 1, p. 162.)

The reports relating to production and shipments include *the entire output of the factories, and the information upon those subjects is complete.* One of the most significant circumstances in this record is the fact that sales to dealers for the general trade were not reported. Such reports were wholly unnecessary. They would have added nothing to the members' knowledge. The price to the dealer was perfectly well known, because they had a uniform differential between his price and the price to the contractors. A number of dealers were examined, whose testimony will be hereafter cited, and it was not suggested by them, nor is it intimated anywhere in the record, that there was any variation in prices to dealers independent of the little variations claimed at times in prices to contractors. Possibly in an instance or two, under special circumstances and with a warning to keep it secret, a slight shade was given a dealer, but those slight discriminations related to specific job contracts. In fact, a dealer generally, if not always, sells the product of more than one manufacturer. **That the reports of sales under specific job contracts was equivalent to reporting prices to dealers is shown by the following discussion which took place at the meeting of March 20, 1916:**

Mr. DUTTON (Coplay): I would like to make a suggestion: In our reporting of these contracts here I do not believe at the present time, as Mr. Cox said the way it works out,

that we have any right here to discuss here as to whether we are going to quote a man as a dealer or simply some other way, and I do not think it would be in harmony. I think that we should simply report these contracts as sold to a dealer or contractor and leave it wholly on the company who is doing the reporting to specify it as they saw fit, *they could very easily take these contracts and check them up if they chose and ascertain that fact.* I had several inquiries from parties as to whether such and such a contract was with a dealer or whether it was with a consumer. As it is, if you want to find out, you have to write a special letter about it to check the matter up and that becomes a matter that takes a lot of time, if you want to go through these 38 pages of contracts here and find out about very many of them.

The PRESIDENT (Giant): Is not that the answer, in view of the fact that you have been able to get that information during the last three months on those that have been reported on that method of inquiry. *It seems to me that a simple look at the price would answer your question there without very much trouble, if you see whether the price was at \$1.05 or \$1.10, wouldn't that answer your question?*

Mr. DUTTON: Still it is an easy matter to take from your own information and report on your own contract and say whether it is a dealer or a consumer by putting a D or a C after it, that would clear up the whole

situation at once, as to how you considered it, and that would save any question unless one wanted to go into the matter further.

Mr. COVER (Security): It would be a good way of getting an expression of how each member regarded his contract, whether he regarded them particularly, in each particular instance as a dealer or not.

The PRESIDENT: *Would not that show by the quotation itself, Mr. Cover, as to what price it was quoted at without saying whether he was a dealer or a consumer?*

Mr. ISRAEL (Coplay): No, Mr. Chairman, as the price does not always remain the same, and there is no such thing as a uniformity of price *owing to the changes of freight rates and distances of delivery*. But as a matter of record of each individual case, I cannot say, unless Mr. Cox finds objection to it, but in the matter of reporting the contracts to the secretary, if we will state if the purchaser is a dealer or contractor, that is all we have to do. (Vol. 1, pp. 462, 463.)

Therefore, as there was a fixed relationship between the price to the dealer and the price to the consumer it was not worth while to incur the enormous additional work and expense necessary to report the sales made to dealers for the general trade.

The forms above quoted and described show that each member had continually in his possession every detail of its competitors' business, in so far as it related to production of clinker and cement,

shipments of cement, the quantity under contract for delivery in the future, and when, where, to whom, and at what price it was to be delivered. Let it be assumed, as claimed by defendants, that it is a fraud upon the manufacturer for a dealer or builder to obtain more cement upon a contract than he would need for the specific job described. Yet the information necessary for the prevention of such fraud would be nothing more than a description of the contract sufficiently full to enable it to be identified; and it would certainly be sufficient to state the name of the purchaser, when and where the cement was to be delivered, the quantity sold and in what kind of a job it was to be used. That information would enable a member to examine his contracts and ascertain whether he had one for the same job, and also would enable it to be ascertained from inspection whether too much cement had been contracted for. But the members of the Association are not content with that information. *It is required that the exact price for which the cement is sold be reported.* The price certainly has nothing to do with the identification of a job unless they all agree to charge the same price for cement delivered at the same place. But the excuse for requiring the price to be reported is thus stated in the constitution:

The second form of misrepresentation is illustrated by the common experience of every manufacturer of Portland cement with statements made to him *not only by dealers*

but often by his own salesmen concerning competitor's practices, with the result that the manufacturer is deceived and imposed upon. (Vol. I, p. 354.)

In other words, *the manufacturers' dealers, and even their own salesmen, are of such character that they cannot be believed*; and to protect themselves against misrepresentations by them as to members' prices and practices the manufacturers must combine *and tell each other what their prices are*. This same excuse is offered by all associations which practice an exchange of prices. It is based on the assumption that the members of the Association are immaculate, while those with whom they deal are dishonest. There is no combination among the customers by which they can be protected against misrepresentations of the members of the Association as to their supposed competitors' prices. It is just as easy and as common for one who is selling an article to misrepresent to the customer his competitors' prices as it is for the customer to make such a misrepresentation. Is there any reason why it should be assumed that the one will not speak falsely while the other will? In fact, the claim that a manufacturer of cement can be so deceived as to prices at which his competitors are selling is flatly contradicted by another defense made as to the practice of exchanging prices. They say that the reporting of prices is of no value whatever, because the reports are out of date when received, the prices of their competitors having

long before been ascertained by 'phone or otherwise. It is, no doubt, a fact that the members of the Association are informed of every change in the price at which another member is selling through their dealers and salesmen before they receive information of such change through the reports. *But the real object of the confidential exchange of prices at which sales are made is that, through the moral effect of such knowledge, the prices may be enhanced when the market is favorable and maintained when unfavorable.* Mr. Morron, the only defendant in the criminal case who went upon the witness stand, unconsciously explained on cross-examination the exact effect of this exchange of prices. He said:

The question of price in those reports did not mean anything to us at all, so far as the specific job contracts were concerned, because we got our prices from the dealers, as I told Colonel Stimson. But I was glad to have the prices of specific contracts reported on that sheet for the purpose of checking up our own salesmen, to find out whether we were losing business because they were not good salesmen or because of the fact that they misrepresented conditions to us and told us somebody was cutting the price.

I would feel very much ashamed to have to sell cement at less than anybody else. I did not want to do it, certainly not. I should hate to think that we were spending hundreds of thousands of dollars in advertising and building up the business of the

Atlas Company, and then have to sell, because of lack of ability of the President, for less than the same kind of commodity was being sold for. As to whether my competitors felt the same way, you cannot ask me about my competitors because I don't know. (Vol. I, p. 338.)

THE IMPORTANCE ATTACHED BY THE MEMBERS TO REPORTING EXACT PRICES AND FILING THE REPORTS PROMPTLY, AS SHOWN IN THE DISCUSSIONS IN THEIR MEETINGS.

At the meeting of January 31, 1916, the president (Giant) said:

This is another thing I want to take up with you gentlemen, the question of reporting price. Some of you have been reporting the delivered price, others the mill price, and I think the simplest way would be for the companies to report the actual delivered price, including freight and everything. (Vol. I, p. 433.)

At the same meeting Mr. Cover (Security) in the course of a statement explaining why his company had not filed its contracts, said:

I stand ready to come forward and bring everything up to date the minute the other companies join the Association and do likewise * * *. (Vol. I, p. 440.)

At a meeting of April 17, 1916, Mr. Cover (Security) brought forth *applause* from the members by announcing that—

I want to make a statement now that beginning the first of next month we will re-

port our contracts irrespective of what anybody else does. (Applause.) (Vol. I, p. 475.)

At the meeting held February 28, 1916, Mr. Brown (Alpha) stated:

* * * we ought to have that statistical information back into our hands summarized not later than the 5th of the month or the 6th, the furthest. (Vol. I, p. 447.)

In the course of a discussion concerning delay in making reports to the Association, Mr. Twamley (Coplay) stated at a meeting of April 17, 1916:

Suppose we *fine* them if they do not have their report in by the 5th. In that way you will have them all in. (Vol. I, p. 475.)

At the same meeting, in the course of a discussion of the subject of exchanging reports, Mr. Erdell (Penn-Allen) stated:

We told the president that if the Association continued to send reports to people who did not furnish reports, we would discontinue sending our reports. (Vol. I, p. 474.)

At a meeting of December 15, 1916, Mr. Smith (Lawrence) said:

The purpose of these daily reports is to give information to each other, and if we hold up the reports unnecessarily, that is bad faith, and I am sure no member is attempting to act in bad faith. (Vol. I, p. 520.)

At a meeting of March 18, 1920, Mr. Goode (Hercules) made this very illuminating observation:

I think now is really the time for every company to know exactly and accurately what the commitments are. (Vol. I, p. 605.)

It was important to know at that particular time just what the commitments of every company were because the manufacturers anticipated higher prices, and they desired to keep in close touch with supply and demand. Their anticipations were realized and in the following July, 1920, the peak of high prices in the cement market was reached.

At the meeting of September 23, 1920, Mr. Dutton (Bath) said:

Our real object is to see the commitments of all manufacturers. If this report is of value if issued every three months, I think it is of value if issued every month. (Vol. I, p. 609.)

The information contained in these reports was also confidential, intended for the exclusive use of the members, and was not to be divulged to dealers and contractors. Thus at the meeting of January, 1921, Mr. Naylor (Knickerbocker) said:

All of these statistics are supposed to be confidential, are they not?

The PRESIDENT (Pennsylvania): I do not think they are necessarily confidential.

Mr. NAYLOR: I mean that they are confidential as among the manufacturers; not to be given out to customers. (Vol. I, p. 625.)

CHECKERS

Checkers are really spies, but by the use of that term no reflection is intended upon those who were employed in that service. It is assumed that the purchasers are endeavoring to obtain more cement than is necessary for use on a specific job, and sometimes it is supposed that there is some excess cement in a locality, and these employes are sent there *to spy out and check up* the situation.

Before the Association was organized, each company looked after its own contracts; and when first organized no provision was made for such agents. It was supposed that if each manufacturer had before him all the contracts of his competitors, he could readily look them over and ascertain whether any of his contracts were duplicates; and, if a duplication was found, it could be arranged between them which would cancel. How the employment of checkers came about and the nature of their activities, is shown by the minutes of the Association meetings and certain correspondence in the record. At the meeting of the sales managers' branch on March 20, 1916, the employment of some one to investigate contracts was suggested by the president (Giant). (Vol. I, p. 467.) At the meeting of July 17, 1916, it was said that at "a little informal gathering" several gentlemen had talked upon that subject, and that it was suggested that the Association have a man at New York to go over the information and find out what jobs were actual

and specific, "it being generally believed the best time to cancel a contract or get out of a phony contract is just before entering into it instead of going through all this terrible rigamarole through two or three months, possibly getting into complication with the dealer." (Vol. I, p. 499.) On October 30, 1916, Mr. Scott, of the Edison Company, wrote the President of the Association recommending the immediate employment of six persons to check over contracts listed and that they begin work immediately. The reason assigned was that "regardless of advanced selling prices which may be created, in view of the constantly increasing cost of manufacture; for the very reasons set forth in the articles of incorporation of our Association, *the cement market will be controlled not by actual costs of manufacture, or supply and demand, but instead by the contracts which have been written in the past few days.*" (Vol. I, p. 371. Side p. 710.)

Acting upon Mr. Scott's suggestion, the president, Mr. Griffith, wrote the secretary, giving him a form of letter which he desired to be addressed to the several members. (Vol. I, p. 371. Side p. 711.) To this letter nine replies were received, all of which were favorable except Mr. Ward, of Kniekerbocker, after stating that any action the majority of the Association desired to take would be satisfactory, said:

* * * but I desire to go on record that I do not think the contemplated action is

either necessary or advisable. In my opinion, each company can check and correct its contracts to better advantage than any one else, and if they have not the inclination to do this, any checking which might be done would be valueless. (Vol. I, p. 371. Side p. 712.)

And the Cayuga Company replied:

It certainly appeals to us that the sales managers of the various companies should know conditions well enough to know when their own salesmen were padding contracts. You know as well as we do that some of the companies have maintained a complete investigating corps outside of the regular selling force for the compilation of figures they desire to get on the different contracts reported.

* * * * *

It looks to me as though some of the manufacturers did not have confidence in some of the others, and it is for this reason that we vote against the resolution. (Vol. I, p. 371. Side p. 713, 714.)

On November 17, 1916, the committee of the Association, appointed for the purpose, addressed a letter to the Association suggesting that they be empowered to employ F. W. Dodge Company to make such investigations. (Vol. I, p. 371. Side p. 722.) This request was granted, and at the meeting of December 15th a report was made by the committee. The secretary made a statement of what the Dodge Company had done. He said they had sent 2,200 requests for investigation to the company, and they had received 800 reports, and up to that

time the cancellations due to those reports amounted to about 86,000 barrels. (Vol. I, p. 519.) The matter of employing permanent checkers was again discussed at the meeting of June 18, 1917; and it was suggested that the officers get in touch with the Mid-West Bureau and ascertain how they were handling the matter. (Vol. I, p. 529.) At the meeting of July 16, 1917, a report of the committee appointed to visit the Mid-West Bureau was heard; and the fraudulent conduct of purchasers in endeavoring to procure and pay for more cement from the manufacturers than called for in their specific job contracts was reviewed at length; and it was reported that the Mid-West Bureau was handling the matter by employing special checkers. And it was said that—

In the Mid-West Bureau this service has proved of value in curtailing to a large extent all the species of abuses which depend on misrepresentation as to specific job contracts, not only "duplication" but also "padding contracts," "shipments on dead contracts," and "diversion on contracts." (Vol. I, p. 533.)

It was recommended that a committee be appointed, empowered to employ an inspection manager and a sufficient number of checkers. A motion was passed that a committee be appointed to make up an estimate of cost, and that the plan be submitted to the executive heads of the companies for a vote by letter. The ballot was taken and all members voted in the affirmative. (Vol. I, pp. 372-374.)

In a letter prepared by the committee and addressed to the members (Vol. I, pp. 541-543) a general suggestion as to forms to be used was made; and the forms subsequently perfected and in use when the petition was filed are as follows:

Form #1—Used by manufacturers in calling the attention of the Association to specific contracts taken by other manufacturers concerning which they desire further information:—

Form 1

Date _____

Cement Manufacturers' Protective Association

19 West 44th Street, New York

Gentlemen:

We desire to call attention to specific contract No. _____ for _____ Brand of Cement for _____ barrels sold to _____ for delivery at _____ with remarks as indicated by check marks herein.

(Check)

- _____ 1. This contract appears to be a duplication of _____ Company's No. _____
- _____ 2. We believe that if this job is investigated it will be found that the amount contracted for is more than the quantity required.
- _____ 3. We know of no such work under construction or contemplated.
- _____ 4. The construction work covered by this contract was completed _____ months ago.
- _____ 5. We are informed that the company shown as the contractors on this work have never been awarded a contract.
- _____ 6. We are informed that the work in question has been indefinitely postponed, for the reason that _____
- _____ 7. We have reason to believe that cement under this contract is being diverted to other work.

Yours truly,

(Gov. Ex. 18, vol. I, p. 361.)

Form #2.—A combination form used by the Association in apprising its checkers or auditors of the particular contract to be investigated, and by the auditor in reporting the result of his investigation:—

Form 2**BUILDINGS**

No. _____ Brand _____ Delivery Point _____
Description of Work _____

Location _____ St. and No. _____
Contractor or Owner _____ Architect _____
Purchaser _____ Total Am't of Contract _____

Has the above contractor been awarded this work? _____

Has work started? _____ If so, when? _____

Is foundation in? _____ Is superstructure started? _____

How many floors are completed[_____

How many floors to be finished? _____

How much cement did each floor take? _____

Give dimensions of building _____

What kind of construction—steel, reinforced concrete,
etc. _____

How much cement does contractor say he has used? _____

How much more cement does contractor say he will
use? _____

What other brands are being furnished for this work? _____

If work has not started state date it will go ahead _____

Estimate date of completion _____

Is any of the cement under this contract to be furnished
to subcontractors? _____

How much cement dealer's books show has been used? _____

Source of information _____

Remarks _____

Date _____ Signed _____

This Form is to be used by the Auditor on the Work.

(Gov. Ex. 19, vol. I, pp. 361-2.)

Forms #5, #5-a, and #5-b.—Used by the Association in submitting to its members the results of the investigation of specific job contracts by the auditor or checker. (Gov. Ex. 21, vol. I, pp. 363-4.)

Form #6.—Used by manufacturers in replying to Form #5 and containing spaces in which manufacturer may indicate (1) whether he considers the report correct; (2) whether he is making further investigation; (3) whether he desires the Association to make further investigation, and (4) the additional information the manufacturer desires the Association to consider. (Gov. Ex. 22, vol. I, p. 364.)

As shown in the letter addressed to the members (Vol. I, p. 541), the investigation of contracts was carried on under the direction of Mr. Gaines, Vice President of the Association; and he appears to have handled it with much diligence and success. The discussion at the meeting of March 18, 1920 (Vol. I, pp. 603-605) indicates the importance attached to this work by the members. And Mr. Hulsart, who succeeded Mr. Gaines, at the meeting of April 29, 1920, stated that the number of investigations made in 1919 averaged 59 per month, while for the months of January to April, 1920, the average was 90 per month. (Vol. I, p. 606.) An extended discussion of the subject was had at that meeting. At the meeting of October 21, 1920, Mr. Hulsart reported that during the first four months the average contracts investigated averaged 100 per month,

but that it had increased to 297 in September, the total number investigated up to that time being 1,838; and that the investigations so far made showed an overestimate of 2,152,000 barrels of cement. (Vol. I, p. 611.) It appears that by that time it had become a race of wits between the manufacturers and the consumers of cement, the latter exercising every ingenuity to procure a little more cement than was actually necessary for the jobs described, and the manufacturers using the ingenuity of both themselves and six paid agents in their endeavor to defeat the efforts of the purchasers, and keep all free cement from the market.

The correspondence between the manager and the checkers and between the manager and the members of the Association indicates the character of the work in which the checkers were engaged, and how they were expected to carry it on. On November 10, 1917, the manager, who was also the vice-president of the Association, wrote Mr. Norton, a checker, as follows:

We are always especially interested in knowing what brand of Cement is used on the job which you visit. And we also like to have as fully as possible, the report of your conversations with the source of your information; as oft-times details that may seem of small importance to you, are of vital importance to us. (Vol. I, pp. 378-379.)

How the checker was expected to treat the information obtained is indicated by the following

letter dated May 20, 1918, directed to the three who were then employed:

We are sending you under separate cover a copy of the monthly contract report, which you are to use for your personal information in auditing contracts.

Please bear in mind that *this information is absolutely confidential* and that you should not under any circumstances divulge to any dealer, salesman or any other person, any information contained in this report.

You are likely to be asked by some dealer or contractor to tell him something about some other contracts in his immediate vicinity and ask you to get this information from this report, but under no circumstances should you do so. (Vol. I, p. 387.)

The length to which the checker was to go in obtaining information is shown by letter dated August 20, 1918, addressed to Mr. Broomall, as follows:

I have a report that C. J. Domsohn & Co. who are dealers, had been buying cement through another dealer in that town at a lower price than the manufacturers can sell in that market. Understand he bought three cars last month. Before you start investigating the two contracts I am sending you, and before you make yourself known in the town, wish you would try to find out what this brand of cement is, *as there is no question in my mind but that some dealer there is taking advantage of the manufacturer and*

drawing cement on contract for resale instead of putting it on the contract covering the purchase of same.

They are no doubt loading cement out of their warehouse from time to time, and if you are not able to get into the warehouse easily, if you would hang around the vicinity of the yard until some cement goes out on a truck, by following the truck you would have no trouble in finding out what brand of cement was delivered from the warehouse.

This is the kind of a job I do not like to have anything to do with, but these are extraordinary times and this seems necessary now. (Vol. I, p. 388.)

And also from the following parts of a letter dated August 31, 1918, addressed to Mr. Norton:

I have information to the effect that the dealer in this case is selling Edison cement in New Bedford at less than the present dealer's price, and what I would like to have you do is to investigate this contract from the city end first, and *without making any more noise than possible* get all the information you can before you go to the dealer. It is more than likely that the dealer will refuse to give you any information, or in case he does, it is liable to be faulty, therefore you should be on your guard and be as careful as possible in verifying everything in connection with this contract.

In the future we are not going to have much trouble along these lines, as the situation is changing, in accordance with another

letter I am writing you explaining the situation fully, but on many of these old contracts *where the dealers have been stealing cement*, we are going to have to do some clever work in turning up the facts, and it is a matter of great gratification to know that I am able to depend upon you entirely in such matters. (Vol. I, pp. 388-389.)

With all their diplomacy the checkers could not avoid trouble with the purchasers and also with some of the members, as shown by correspondence begun by a complaint of the Vulcanite Company with reference to something that Mr. Norton was supposed to have said to the Sears Lumber Company, one of the Vulcanite's customers. After considerable correspondence had passed between Mr. Norton and Mr. Hulsart, who was then manager, and Mr. Hulsart and the Vulcanite Company, it ended in a mild reprimand administered by Mr. Hulsart to Mr. Norton. (Vol. I, pp. 390-394.) Similar complaint seems to have been later made by the same company with reference to some remarks made by Mr. Norton on another occasion which ended by Mr. Hulsart stating in his last letter to Mr. Norton:

I wish also to again remind you of the very great care that all of our auditors must use in avoiding subjects in interviews that may be misquoted, misinterpreted or lead to inferences not intended by the auditor. (Vol. I, p. 400.)

It would be supposed that when each of two competitors had a contract to furnish cement for a certain job friction would arise between them as to which one of the contracts should be canceled; but there is no evidence in the record that any such friction ever existed. And the willingness of the members to cancel contracts is shown by some of the discussions which occurred in their meetings, and by communications and reports made to the Association. Thus, in the meeting on March 20, 1916, appears the following:

Mr. SWETT (Lehigh): Certainly. For instance, if I have a contract for one thousand barrels of cement and the secretary calls my attention to this contract stating that he believes that it is a duplication and not a bona fide contract and I, upon investigation find that such is the case, I cancel the contract and I so advise the secretary and then the secretary in turn advises all the members of the action that I have taken.

The PRESIDENT (Giant): Some of them don't seem to want to cancel some of these contracts.

Mr. SWETT: That is the trouble, that is what I am trying to bring out. I am not making any complaint about the manufacturers that do take steps to investigate their contracts, it is those that do not take steps to investigate their own contracts. The fact that any competitor of mine called my attention to a contract that did not look quite right or the proper way, I would say now

that I would not stop at any expense to investigate it thoroughly. If the contract was so, that I found the contract was not proper, I would take steps to cancel it. I think we should all do likewise if we want to get anywhere. That is the purpose of this Association. (Vol. I, p. 465.)

The discussion was further extended when the following occurred:

Mr. ERDELL(Penn-Allen): I think without doubt that very shortly one or the other of the companies will cancel their contract. We have all said that between ourselves, and as soon as Mr. Griffith raised the question this month and wanted to have the thing cancelled before the end of the month, I took it up very vigorously to see if there was not some arrangement could be made and either one or the other cancelled it. If our cement does not go on the job, I shall cancel our contract immediately.

The PRESIDENT: *That is the spirit gentlemen. That is the way to do it.*

Mr. ERDELL: *I will tell you what we will do, we will cancel our contract as far as it comes here it ceases, it goes off of there.*

Mr. SWETT: Let it stay on, it would be better.

Mr. GILKYSON (Phoenix): It is entirely up to the Association.

The PRESIDENT: It is the understanding that who ever gets the job, the other will cancel.

Mr. GILKYSON: The only danger I see on that particular job is that this cement is asked for through a dealer; *and I am afraid that dealer will misuse some of that cement; if it is left up to him.* (Vol. I, p. 466.)

On March 17, 1916, the sales manager of the Vulcanite Company wrote the Association requesting that several contracts of the Dexter Portland Cement Company for the delivery of quantities of cement at Manchester, Connecticut, be investigated, and closed his letter with the following paragraph:

All of these should be canceled in order that the manufacturer may be protected *and the market of Manchester and South Manchester not disturbed.* (Gov. Ex. 354, Vol. II, pp. 698-9.)

On March 31, 1916, the Secretary of the Association wrote the Knickerbocker Company:

I have your favor of March 30th, in regard to notifying members of the Association that you have canceled 5,000 barrels on your contract #25. You are correct in saying the information should be distributed to all members, and it was decided by the Committee on Detail at their meeting in New York, Tuesday, that a weekly letter should be issued from this office, stating all cancellations and all matters upon which information has been asked and closed. (Gov. Ex. 358, Vol. II, p. 700.)

On June 14, 1917, the assistant to the president of the Atlas Company wrote the Association, *re-*

porting the cancellation of an unshipped balance of 19 barrels on a certain contract, and requesting that the records of the Association be adjusted accordingly. (Gov. Ex. 368, Vol. II, p. 705.)

On June 11, 1917, the Association was advised by the Atlas Company of the cancellation of an unshipped balance of 7 barrels on a certain order, and was requested to amend the records of the Association accordingly. (Gov. Ex. 369, Vol. II, p. 705.)

On June 1, 1917, the Atlas Company advised the Association of the cancellation of $1\frac{1}{2}$ barrels of cement, and requested that the records of the Association be modified accordingly. (Gov. Ex. 370, Vol. II, p. 705.)

On June 27, 1917, the Atlas Company reported to the Association the cancellation of $\frac{1}{2}$ a barrel of Portland cement. (Gov. Ex. 371, Vol. II, p. 706.)

On June 1, 1917, the Atlas Company addressed a letter to the Association, reporting the cancellation of a balance of $\frac{1}{4}$ of a barrel (one bag) of cement due on a certain contract, and requested that the records be amended accordingly. (Gov. Ex. 372, Vol. II, p. 706.)

Thus was the great Atlas Company teaching by example the diligence that should be exercised to avoid the disturbance of the future market.

VII

THE FREIGHT RATE BOOKS, THE ARBITRARY BASING POINTS, AND THE PRACTICE OF SELLING CEMENT F. O. B. POINT OF DELIVERY ONLY.

Like all other "open-price" associations, this one adopted an easy method, and a very efficient one, of figuring in the freight to ascertain the delivered price at every point where a delivery would be likely to be made.

The price paid for a barrel of cement consists of three main elements: (1) The price at the mill, (2) the price of the bags, and (3) the freight charges. The evidence shows that the price of cement sold by all companies for delivery to the same point at the same time was made up of the same base or mill price, the same charge for bags, and the same charge for freight, regardless of the point from which the shipment was actually made. Uniformity of price was the inevitable result. (Vol. I, p. 146.)

The by-laws of the Protective Association provide that the secretary shall prepare and distribute among the members a complete schedule of freight rates on cement, and shall immediately advise all members of changes in freight rates. (Vol. I, p. 359.)

The Association distributed to its members freight-rate books covering all the New England

States and the States of New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, the District of Columbia, and Ohio. (Vol. I, pp. 153-154.)

Manifestly books of this character were used by the members of the old Association of Licensed Manufacturers, as in Schedule A attached to the license agreement a "List of Delivery Points and Sections" was provided for. (Vol. II, p. 773.) The first books used by the members were furnished by the Alpha Company, who, it seems, already had quite a supply on hand. (Vol. I, p. 412.) In the meeting of January 14, 1916, the representative of the Vulcanite Company said:

The Alpha Cement Company have turned over to this Association something which I know to be of very real value, and of large money value, and I think the Association ought to thank them for it. (Vol. I, p. 413.)

The freight-books published by the Association were used in making prices and were intended solely for the use of members. (Vol. I, p. 461.)

A memorandum exchanged between officials of the Atlas Company, under date of March 1, 1916, contained this statement which conclusively shows that it was the understanding that the figures appearing in those rate books were to be used by the members in making prices for quotations:

On Friday, February 25th, we received freight rate books for all the Eastern territory, including Ohio.

These books, as I understand it, are to be used in making prices, whether the rates are correct or not. (Vol. II, p. 969.)

This memorandum appears to have been sent the Association, and to have passed into the hands of the other members, as on March 16, 1916, Mr. Young, of Lehigh, in a note addressed to Kimball, the author of the memorandum, after quoting it added:

For your information would advise that we have checked the books covering freight rates to points in West Virginia and find 618 errors * * * (Vol. II, pp. 970-971.)

That these books were for the members alone, and that they could be used by dealers in a way to disturb the market, is shown by remarks made in the meeting of March 20, 1916. Mr. Twamley (Coplay) had incidentally remarked that he had received requests for books from customers, which called forth the following discussion:

Mr. DUTTON (Bath): One moment, may I have a moment before you put that question? I would like to say, that as far as giving books to customers for them to use to figure freight rates on, I would like to ask whether that is not a dangerous practice? We have a lot of inquiries for freight rate books. The ordinary customer is supposed to be selling in his own town. He knows what the freight rate is there. It means that every time there is a change of freight rates, we have to keep in touch with the freight books that we have

given out and see if they get the correct notice of the change of the freight rate. I think it is saddling on to each company who does that a whole lot of responsibility which may be a means of causing disturbances at different times on our quotations. We have a lot of inquiries about them, and I have always turned them down, I have not let any of them get outside of our own company.

The PRESIDENT (Giant): I think you are right.

Mr. SWETT (Lehigh): I don't think the customer should have the use of these freight books.

Mr. WEAVER (Allentown): I don't think so either.

The PRESIDENT: It is a matter for the Association members, and not for the customer.

Mr. DUTTON: That is what I believe.

The PRESIDENT: I don't think these books are made up for distribution among the customers of any company, it is for the use of the members of the Association solely, and their different branches.

Mr. DUTTON: I might simply say this, all this was brought home sharply to me; *about a year ago I was requested by a dealer in Baltimore for a freight rate book*, and before I gave it any thought, *I sent him one*, and it was but a short time before I learned that he was making prices at different points down on the eastern shore there, and *he had those freight rate books which he was using to upset the business that we had with the differ-*

ent dealers, and it all started from letting him have one of those freight books.

The PRESIDENT: I think this information should be kept for the members of the Association, and not for its customers. (Vol. I, p. 461.)

If the prices were not uniform at the mill and the delivered price based on the freight rate book, how could a dealer figure them out and "upset the business"?

Freight rates were published from the several basing points to practically every city and town in the northeastern section of the United States; and if there were 618 errors in the West Virginia book the total errors in all the books were innumerable.

On April 25, 1919, the secretary of the Association wrote a letter to a manufacturer, in which he said:

* * * the rates published in our freight rate books are prepared by three cement companies who must concur absolutely before the rates are given out for publication. (Vol. II, p. 966.)

If freight rates are fixed by the Interstate Commerce Commission, and are definite and specific, what is the occasion for representatives of three of the largest companies belonging to this Association concurring on the rates to be published; and why was it necessary for those representatives to proceed to Allentown, Pennsylvania, prepared to stay all week if necessary to iron out the differences in

those rates, as is shown to have been done in a letter from Clark, Traffic Manager, to Gaines, Vice President of the Association, dated September 5, 1918? (Vol. II, p. 968.)

In August, 1920, the Knickerbocker Company transmitted to one of its salesmen a list of corrections furnished by the Association to be made in a certain freight rate book, stating:

* * * they are not absolutely correct, there will be another correction sheet sent you later. *However, these figures are to be used when quoting for new market business.* (Vol. II, p. 974, 975.)

The relation of the freight rate books to prices is further illustrated by the following excerpt from a letter relating to freight rates dated December 13, 1920, which passed between officials of the Knickerbocker Company, to wit:

As a matter of fact, I have learned, since returning from Boston, that there are about four kinds of prices out. This difficulty will be overcome shortly I hope by the issuance of new freight rate books. (Vol. II, p. 978.)

That is, after the issuance of the new book, *there would be but one price.*

The mills of the defendants are located at 26 points, as follows (Govt. Ex. No. 201; Defts. Ex. No. D818 neither printed):

Group 1: Newcastle, Pa.

Group 2: Hudson, Cementon, Jamesville, and Glens Falls, New York.

Group 3: Martinsburg and Manheim, West Virginia; Norfolk and Fordwick, Virginia; and Security, Maryland.

Group 4: Coplay, Northampton, Evansville, Martins Creek, Bath, Saylors, Nazareth, Egypt, Hercules, Siegfried, Ormrod, West Coplay, and Fogelsville, Pennsylvania; New Village, Alpha, and Vulcanite, New Jersey.

It was manifestly impracticable to submit the official tariffs showing actual freight rates on cement from all mills to the many thousands of delivery points at which the defendants have sold cement in this section of the country. To illustrate the general proposition, however, that freight rates vary with distances, a shorter haul taking a lower rate (Vol. I, pp. 147, 151), the Government has submitted in evidence 56 official tariffs¹ showing actual rates from the mills in Group 4 (except Fogelsville) to more than 900 destinations in New Jersey, this group being the only one in which mills are so closely contiguous that the same rate may in any instance apply from all. Rates from the mills in Groups 2 and 3 differ more widely, those in Group 3 being situated as follows: Fordwick approximately 100 miles in a direct line from Man-

¹The tariffs are of the Central Railroad of New Jersey, Lehigh Valley, Philadelphia & Reading, and Delaware, Lackawanna & Western. (Govt. Ex. Nos. 261 to 316.) The rates given were in effect between June 25, 1918, and August 26, 1920, these being used as comparable with the Freight Rate Books in evidence, which came into use, as a revised edition of those previously used, about October, 1918.

heim, 120 miles from Security, 125 miles from Martinsburg, 200 miles from Norfolk, and 300 miles from the mills in Group 4. A glance at the map, defendants' Exhibit No. D818, shows a like dispersion of mills in the Hudson district.

The rates taken from the tariffs have been carefully compared in a tabulated statement prepared by the Interstate Commerce Commission (too voluminous to incorporate herein), which shows that two, three, and four different rates apply to more than 500 points in New Jersey out of 890 compared. The tariffs in evidence contain freight rates not only to points in New Jersey but also to a very great number in New York and Pennsylvania, and show a similar variance. A very large part of the cement manufactured in the Lehigh Valley district goes to points within the area in which rates differ. (Gov. Ex. 429, vol. II, p. 707. Side pp. 1469-1471.) One of the forms of the Association in evidence shows that practically as much cement is shipped to points in New Jersey as to all New England States, the respective amounts for December, 1920, being 826,861 and 862,342 barrels. (Gov. Ex. 67, p. 370. Side p. 709.)

Notwithstanding the wide dispersion of the mills and the consequent difference in the freight rates, as will be hereafter shown, the prices at which cement is offered and sold by all defendants at the same point at the same time are almost invariably exactly uniform. This is accomplished by making

all offers and sales upon the basis that all cement sold at any particular destination is shipped from a single point; and, consequently, that a single freight rate applies; or, stated in another way, all defendants have the same price at the mill (Gov. Ex. Nos. 325, 327, 330, 333, 336, vol. II, pp. 672-674, 675, 680. Side p. 1394, 682, 684), and add the same freight rate from them all; and therefore charge a uniform price at the point of delivery. Thus, as a former salesman testified, he was furnished a freight rate book showing rates from basing points, and computed the price "by having a *mill* price and then adding the cost of the sacks plus the freight rate to any given point." (Vol. I, p. 147.)

To conveniently and accurately apply this rule, four or five of the points of manufacture in the northeastern section of the country have been selected as basing points. The points so used by the defendants in this part of the country are called Universal, Hudson, Fordwick, and Lehigh Valley, the latter being the most important.

The defendants explain the basing points as "each point where cement is produced in sufficient quantities to affect the market to all delivery points" and the basing points are "a means of securing the lowest price at which cement can be obtained at any point." (Answer, Vol. I, pp. 101-108.)

Universal basing point is the location, in the extreme western part of Pennsylvania, of a mill of the Universal Portland Cement Company, not a

defendant in this particular action. (Defts. Ex. No. D818 and Vol. I, p. 146.) The Universal basing point does not "belong" to the Eastern Association—that is, to the Cement Manufacturers' Protective Association (Vol. I, pp. 146, 339)—and in fact it was seldom or never used in computing the price of cement sold in that part of the country.

Hudson basing point is the location on the Hudson River of plants of the Atlas and Knickerbocker Companies. The two plants at Hudson basing point produced annually during the six years immediately before this suit was instituted an average of 2,003,917 barrels of cement.² In that district more cement is produced elsewhere than at the basing point; and the total unused capacity elsewhere in that district has been more than the actual Atlas production at Hudson. (Gov. Ex. Nos. 373A, 374, 386, 387; vol. II, p. 706. Side pp. 1447, 1447½, 1453½, 1454. Defts. Ex. No. D818.) Hence, the entire basing point production could be withdrawn and yet, if the unused capacity was applied, a larger supply would be available.

Fordwick basing point is the location in the western-central part of Virginia of a plant of the Lehigh Company, as above stated, remote by many miles from other mills. The average annual production at that point for the six years was

²The Atlas Company's production is not separately given as to Hudson basing point, but is estimated as corresponding to the relative capacity of the Hudson plant to the company's total capacity in this section of the country. (Gov. Ex. No. 386, vol. II, p. 706, Side p. 1453½.)

532,515 barrels.³ (Gov. Ex. Nos. 373A and 374; vol. II, p. 706. Side pp. 1446, 1447, 1447½. Defts. Ex. No. D818.)

Production at Fordwick, however, is less than at each of two of the three mills which use it as a basing point, and only 34,000 barrels more than that of the other. (Gov. Ex. Nos. 373A, 374; vol. II, p. 706. Side pp. 1446 and 1447, 1447½; Defts. Ex. No. D818.)

Lehigh Valley basing point is not a specific shipping point, but refers to an area of about 50 miles in the vicinity of Allentown, Pennsylvania, and partly in New Jersey, over which are scattered, at 16 different locations, mills of all but three of the defendants, as shown in Group 4. (Vol. I, pp. 146, 149.) Northampton, the location of a plant of the Atlas Company, is the basing point for Lehigh Valley. The annual average production at that point during the same six years was 5,305,694 barrels.⁴ The annual average production at the other Lehigh Valley mills for the same period was 19,785,031 barrels. (Defts. Ex. No. D818.) Twice the actual production of the Atlas Company—the basing point production—could have been with-

³ Production at Fordwick is not stated separately for 1918, 1919, and 1920. The production assigned for those years is the figure for 1917, namely, 604,000 barrels, considerably in excess of that assigned in defendants' Exhibit No. D818.

⁴ Production at Northampton is not separately given. The capacity at that point, however, being five-sixths of the Atlas total capacity, that part of the actual production for the years given has been assigned to the Northampton plant. (Govt. Ex. Nos. 373A, 374, 386; vol. II, pp. 706. Side pp. 1446 and 1447, 1447½, 1453½.)

drawn and offset by the more than 10,000,000 barrels of unused capacity of the other mills in the Lehigh Valley district. (Gov. Ex. Nos. 373A, 374, 386, 387, vol. II, p. 706. Side pp. 1446 and 1447, 1447½, 1453½, 1454.)

The basing points Hudson, Fordwick, and Lehigh Valley, are used with respect to all but a relatively inappreciable quantity of the cement sold by the defendants in this part of the country. The base prices at Fordwick are 5 cents less than Lehigh Valley, while the price at Hudson is always 10 cents per barrel above Lehigh Valley. (Govt. Ex. Nos. 675, 676; vol. II, p. 963. Side pp. 1820½–1842½.) Upon any specific sale, however, the price involves the supposition that only one of the base prices is the price at all mills.

The freight rates used in conjunction with the base price, of the uniform mill prices, have been compiled by the defendants in seven printed tablets called Freight Rate Books, each showing freight or delivery rates from two or more of the basing points to "practically every place where cement can be delivered in the northeastern section of the United States."

Cement is sold in units of a barrel of 380 pounds, while the tariff rates are per unit of 2,000 pounds in carloads. (Vol. I, p. 244.) Barrel rates are not published, hence the transportation cost per barrel is necessarily stated with fractions. (Vol. I, p. 244.) Each delivery rate given in the Freight Rate Books, however, disregards fractions, and though

founded upon a true rate from a single mill is inaccurate to that extent. While, therefore, these rates are not, as defendants represent in their answer, official rates, even from the basing points, the Government makes no point of mere fractional deviations. As to other mills, these rates are not the official rates and can not serve "to prevent mistakes and errors in freight charges," as defendants also represent; nor can they obviate the necessity of each manufacturer ascertaining the actual rate between his mill and points of delivery. Consequently, for any other purpose than to render certain uniformity of prices, each rate is a fiction. For this schedule of delivery rates, the tariffs afford a convenient and ideal basis, lending it color of legitimacy and concealing its unlawful purpose. Proof of the official freight rates was relevant only as showing the fictitious character of the Association's so-called freight rates. The buyer pays the *actual freight* to the railroad, receiving credit upon settlement for the cement; and he thus becomes accurately informed of the rate from the mill.

The use of arbitrary rates to some points was deliberately continued, even after their incorrectness was known. For instance, a letter dated April 2, 1919, between the traffic managers of the Alpha and Atlas, sent also to the vice president of the Association, stated:

* * * you show a higher rate from Alsen and Hudson to this point (Fishers, between Bangor and Ellsworth, Maine) than

is in effect to points on either side. This, of course, is correct under the present tariffs issued by the New York Central Railroad but we are asking them to check in rates to this point the same as are now in effect to points on either side. When this is done, it will necessitate another correction notice. (Gov. Ex. 680, vol. II, p. 966.)

The members of the Association, without exception, make all sales f. o. b. point of delivery, requiring the purchaser to pay the freight and allowing him credit therefor when making payment of the invoice for the cement.

The Whitehall Company, which is not a member of the Association, (Vol. I, p. 145), sells f. o. b. its mill, customers paying the actual freight as published in the tariffs and of which they are informed by the company. (Vol. I, p. 152.)

To supplement this practice and to make more certain that cement could be obtained at no destination except at the uniform prices made by defendant corporations, the contracts of all but three exclude the buyer from control of shipments until arrival at destination, yet place upon him all responsibility from the time shipments are delivered to the railroad company at the mill. (Gov. Ex. Nos. 628, 571-600; vol. II, pp. 821-916 and 961. Side p. 1811.)

The basing point prices and the delivery charges given in the Freight Rate Books are applied in the following manner: Each defendant company tells

its salesmen to sell at any delivery point by adding to the base prices the freight designated in the Freight Rate Book from each and quote the lowest total. (Vol. I, pp. 146-147.) For instance, to the little town of Absecon, New Jersey, the salesmen of many or all the defendants would come, each equipped with an identical New Jersey Freight Rate Book showing ostensible freight rates from Universal and Lehigh Valley basing points. Let it be supposed that the Universal and Lehigh Valley base prices are at the time \$1.70 and \$1.75, respectively. Each salesman adds to the Universal price the amount designated as the freight from that point, namely 80 cents, and to the Lehigh Valley price the figure given as the rate from that point, namely 53 cents. (Gov. Ex. No. 4, vol. I, p. 353. Side p. 638.) Disregarding bags, the sums are stated thus:

	Universal.	Lehigh Valley.
Base price -----	1.70	1.75
Delivery -----	.80	.53
	<hr/>	<hr/>
	2.50	2.28

The lower is the price quoted by all. (Vol. I, pp. 146, 185, 250, 251.) The salesmen had "positive instructions" to make prices in this manner, and were without discretion or authority to deviate therefrom. (Vol. I, pp. 146, 147, 152.)

Each mill, except the one actually situated at the basing point, has in reality a different price for each buyer. Hence, discrimination is not only not pre-

vented, as the defendants suggest in their answer, but is inherent in the basing point price fixing device. The following table, comparing prices actually realized on shipments to Reading, Pennsylvania, minus actual freight, shows how large communities are thus discriminated against and deprived of the benefit of proximity to a mill and of the consequent "difference in the cost of * * * transportation" which the Clayton Act specifically contemplates they shall enjoy. (38 Stat. 730, sec. 2.)

Company	Barrels ¹	Price minus bags	Actual tariff rate	Assn. rate	Actual mill price
Allentown.....	46,000	\$2.12	² 25.441	37	\$1.86559
Lehigh.....	10,000	2.12	² 31.312	37	1.81688
Coplay.....	2,000	2.12	31.312	37	1.81688
Penn-Allen.....	2,800	2.12	³ 37.183	37	1.74817
Lawrence.....	3,500	2.12	⁴ 37.183	37	1.74817
Bath.....	1,500	2.12	⁴ 37.183	37	1.74817
Vulcanite.....	8,400	2.12	⁴ 37.183	37	1.74817
Dexter.....	4,000	2.12	⁵ 37.183	37	1.74817

¹ Transactions taken from Form 10, pp. 40-41, Nov. 1, 1919.

² Govt. Ex. No. 302. Mills at Evansville, Ormrod, West Coplay, Coplay, and Saylors.

³ Govt. Ex. Nos. 304, 311. Mills at Nazareth and Bath.

⁴ Govt. Ex. Nos. 261, 266. Mills at Siegfried and Vulcanite.

(Exhibits not printed.)

The above is one of many instances where the actual rates differed as much as 12 cents per barrel from the rate charged, the Association rate being based on the highest, and where the city of Reading paid the Allentown Company, which enjoyed the shortest haul, \$564 more than it would have paid at the base price plus actual freight. If competition existed amongst the defendants and if the basing

point price fixing device were the development of competition, the Allentown Company would have been compelled to share with the purchasers of cement at Reading and the many points elsewhere similarly situated some part of this \$564.

The following testimony of Mr. Shade, a buyer, shows that the Freight Rate Books are used solely for the purpose of quoting uniform prices:

The Lehigh have a factory at Fordwick. I carried on special negotiations with Lehigh. They were the first ones I went to because they had the advantage of a good location, that is, they were the closest mill to the job. I asked their salesman, Fred Ford, why he wouldn't give me a lower price because he had a closer mill. He told me he would either give me the Lehigh cement shipped from the Lehigh Valley or Lehigh cement from Fordwick at the same price. He would make no difference in the delivered price whatever, although the freight was considerably less. I deducted the freight on the Lehigh cement from his delivered price and got the mill price and asked him to sell me that same cement at Fordwick at that base price and allow me to pay the freight. He said they wouldn't do that
* * * (Vol. I, p. 225.)

VIII

INFORMATION CONCERNING CREDITS

Clause (a) of Article III of the Constitution gives information concerning credits as one object of the organization. (Vol. I, p. 355.) The following forms are used by the association in carrying into effect this provision of its constitution:

Form #25.—Used by manufacturers in reporting to the Association monthly all delinquent accounts. It shows among other things the customer's name and address, and the amount of unpaid accounts four months or more old, three months old, two months old, and the ledger balance. It also shows the accounts which have been placed in the hands of attorneys. (Gov. Ex. 59, Vol. I, p. 367, side p. 703.)

Form #15.—A so-called credit report, by means of which the Association communicates to all its members each month the information received on Form #25. (Gov. Ex. 60, Vol. I, p. 367, side p. 704.)

Form #16.—Issued by the Association and distributed to its members along with Form #15, being a summary of the information and data contained in that report. (Gov. Ex. 61, Vol. I, p. 368.)

Form #17.—Issued monthly by the Association and distributed to its members along

with Form #15 and Form #16, being a summary of past due accounts for the preceding 12 months. (Gov. Ex. 62, Vol. I, p. 369.)

Form #18.—Issued monthly by the Association to show accounts placed by various members in the hands of attorneys for collection. (Gov. Ex. 63, Vol. I, p. 370.)

Form #31.—Issued monthly by Association and showing by chart or picture certain information reported on Forms Nos. 15-18. (Gov. Ex. I, p. 161.)

Form #27.—Used by Association in answering specific requests of members for information concerning a certain account. (Gov. Ex. 64, Vol. I, p. 370.)

Form #26.—Used by manufacturers in reporting quarterly to the Association (1) Total bags returned; (2) Total bags rejected. (Gov. Ex. 65, Vol. I, p. 371.)

Form #19.—Summary report compiled by Association from Form #26 and issued quarterly to its members showing as to each company (1) Total bags returned; (2) Total bags rejected; (3) Per cent rejected; (4) Per cent rejected during the preceding year. (Gov. Ex. 66, Vol. I, p. 371.)

For explanation of forms, see evidence of Miss Phalen, Vol. I, pp. 159-161.

It is proper for business men to have some method of ascertaining the moral and financial responsibility of their actual and would be customers. Agencies exist to procure and for a consideration impart such information. But as those who sell

the same trade have peculiar knowledge as to the reliability of buyers, there is no good reason why they should not exchange among themselves the information they possess upon that subject. *But the practice should be confined strictly to an exchange of knowledge, and certainly should not extend to any understanding, expressed or implied, as to circumstances and conditions under which credit will not be given.* Such an understanding is equivalent to the creation of a black-list, which often has been condemned. Furthermore, there should be no stipulated list of customers to whom it is agreed that certain advantages shall be given. Everyone should be absolutely free to sell to whom he pleases, and on such terms as he pleases.

The record does not contain sufficient evidence to justify the inference that a list of those who should be considered dealers was actually maintained *and agreed upon*, although there is evidence that there was a list of dealers, and that one had to be on that list to purchase cement at dealer's prices. Thus Mr. Thropp, general manager of a coal and iron concern, testified that in about May, 1916, he had a conversation with a representative of the Lehigh Company who had charge of the territory he was in. The salesman quoted his price, and Mr. Thropp told him he wanted a lower figure; but the salesman said he could give it only if he could get the company's name put on the list of Association dealers; that "then he could get a reduced price if our name was authorized by their Association; and later on,

within a week or so, we got a contract from the Sales Manager of the Lehigh Company, giving us the dealer's price through one of our stores." (Vol. I, p. 227.) His company operated four or five stores; and they sold "some building supply stuff" (Vol. I, p. 228); but the important thing was that the company had to be on the Association's list in order to purchase cement at the dealer's price.

A positive agreement not to sell certain individuals, or individuals who have not complied with stipulated conditions, is not the only, or most effective method of imposing a restraint upon the members of an Association in their dealings with customers. For illustration, it would manifestly be unlawful for those who control the supply of a commodity to agree that they would not sell to any person who had permitted a bill to go unpaid for a period of say sixty days. But if such an agreement be unlawful, any system is unlawful which by concert of action brings about the same result. And the Government insists that the discussions at the meetings with reference to extension of credits were of such character that a greater restraint was thereby imposed upon the members than there would have been by a positive agreement as to conditions upon which credit would be given, not accompanied by personal comment. The following excerpts from discussions of their meetings are cited as examples.

In the meeting of the Credit Men's Branch on January 31, 1916, there was under discussion the

question of reporting delinquencies of ten dollars and less. The following colloquy occurred:

Mr. Medler (Atlas): I do not see why you eliminate any amount. If you keep out of the record accounts of the customers who owe \$9 and less, *you have just a chance to make an allowance of that \$9 to this customer. In other words, you might cut your price \$9 whereas if that was reported it would be a different proposition.*

Mr. Hilles (Dexter): It might be discrimination, that is what you are driving at, it might be discrimination?

Mr. Lober (Vulcanite): It might be, why not?

Mr. Hilles: Mr. Medler's point is well taken, it would be much better that we report everything.

Mr. Medler: That is a way a discount might be forced, if a man habitually holds out \$4 or \$5 and you make that concession to him which he is not entitled to, after that has been repeated you realize that enters into the question of credit of that man, and that is something that we should all know.

Mr. Matthes (Alpha): I move that the companies report their accounts as they have in the past and designate any of these small balances that may be disputed items.

Mr. Alker (Pennsylvania): I second the motion.

The President (Giant): Gentlemen, you have heard the motion, all in favor of it will say "aye." (Ayes.) The contrary "no." Carried. (Vol. I, p. 422.)

And again:

Mr. Jiggins (Giant): Are we to report that an account placed in an attorney's hands has been paid later?

Mr. Matthes (Alpha): I do not know as that is essential. It is valuable information to have but the fact that there had to be action taken of placing your account with an attorney is what you want to get at.

Mr. Medler (Atlas): *That is all I want to know.*

Mr. Hilles (Dexter): *We do not care whether he pays or not.*

Mr. Lober (Vulcanite): The fellow interested in whether he pays it or not is the fellow who owns the account.

Mr. Medler (Atlas): *If we have to sue a man to get the money we won't sell him that's all.*

Mr. Gilkynson (Phoenix): When he has paid the attorney or the attorney has had to bring suit and he has paid after suit that would be interesting information.

Mr. Matthes (Alpha): You are the only one interested in that. (Vol. I, p. 422.)

After the discussion had been further extended,

Mr. Lober (Vulcanite) remarked:

This will bring everything except the accounts in attorneys' hands on one list and will make just that much less searching necessary, and will also show you if this particular man is a customer of one company and he is giving notes in payment and to another company he is running an open account; for instance, he may be giving one man notes and he may be meeting these notes

promptly as you will see by comparing that list from month to month, he pays them when due or on the other hand he may be giving notes and stringing along indefinitely in renewing them. This information will all be on one sheet here and by a quick comparison you can determine just what his status is and if he is playing fast and loose with you, if he is in one case doing directly opposite from what he is in another. (Vol. I, p. 423.)

The discussion was still continued, and Mr. Bodin () said:

Well, it was brought out so strongly by someone here that they didn't care to have anything to do with anybody that had to be sued, if that was the idea, I thought we ought to know more about it. (Vol. I, p. 425.)

And the result of the discussion appears from the following remarks:

Mr. Bacon (See'y) : Do I understand the report comes in as to placing in the hands of attorney are not to have any description or are to have any description of what the action has been, but simply a statement showing they are in attorney's hands, is that it?

The President: Yes.

Mr. Lober (Vulcanite) : On the first of February all you will have to report, is this is placed in an attorney's hands, those accounts that have been placed there during January, without any report as to the result on previous accounts. (Vol. I, p. 426.)

Subsequently, at the meeting of March 20, 1916, a somewhat different view prevailed as to whether or not the payment of accounts which had been placed in attorneys' hands should be reported. Mr. Hahnemann (Bath) made the suggestion that payments of such accounts be reported. Mr. Jiggens (Giant) remarked that at a previous meeting it was decided that if anyone desired additional information he could call up the company who had reported the account; and the President said: "At the last meeting, it was decided that accounts placed in the attorney's hands, should be left in that state"; but that if a change was desired the members could very easily be requested to send in reports showing payments; and a motion to that effect was carried. But immediately after this action was taken, Mr. Lober (Vulcanite) said:

I want to bring out the point that several of the interested members made in connection with that attorney's list. *They wanted that list to be kept as a sort of permanent reminder, or evidence that the man's name had gone on that list and that was enough for them. They didn't care whether the account had eventually been paid or not. They still wanted to know that that fellow had been subject to a suit, for they themselves did not want to sell him if some other person had to sue them.* And Mr. Medler was very emphatic about that, and therefore I understand that it was the majority of the meeting in New York—when I was running this thing—that the majority of the members

would not want the name removed from the list, when it was paid—when the account was paid. They want the name continued there as having been sued at some past time. Of course, mark them paid, that is all right, but still keep the name in that list. (Vol. I, pp. 453-454.)

The remarks of Mr. Lober made in the meeting of October 15, 1918, show how promptly accounts placed in hands of attorneys were reported. Mr. Lober said:

Those special reports, those special notices of accounts placed in attorney's hands, as I understand it, are sent out immediately on receipt of notice from the company that they have placed that account with an attorney. There is a special circular sent out to all of the members at once. They do not wait for the issue of the regular monthly report. (Vol. I, p. 569.)

It appears that the members also at times conversed with each other over the telephone in regard to the standing of a purchaser. Thus in the meeting of January 23, 1919, Mr. Lober (Vulcanite) detailed a statement he had made to Mr. Naylor (Knickerbocker), who had inquired of him with reference to the credit of a purchaser, whom his company had sued. The reason for the suit is thus stated:

We placed an account in the attorney's hands, an account of a concern which was in good credit, discounted their bills. *It was due to their having misused contract cement*

which we found, discovered, as a very flagrant case. We charge them with the difference between the market price and the contract price which they refused to pay, and eventually that account was placed in the hands of an attorney for collection, or it still is. Another company was interested in that account, and when they noticed we had placed it in the attorney's hands, within a day or so afterwards, I got an inquiry from the credit man of that other company asking for the particulars. (Vol. I, p. 581.)

At that same meeting there was submitted by the credit committee the form of a questionnaire to be sent out to the members, the object being to bring out opinions as to how improvements in the credit system could be made. The 8th question was: "What do you consider a bad debt? When do you charge it off?" The Chairman inquired: "Mr. Lober, was not that last question the subject of a good deal of discussion at the meeting they had over at the Biltmore?" (p. 583) which remark indicates that they had been discussing this subject at meetings not reported, probably committee meetings. A motion was carried instructing the officers to send out the questionnaire; and the Chairman stated that the answers would then be placed together and sent to the different credit managers. (Vol. I, p. 583.) At the meeting of April 17, 1919, a report was made by the Credit Committee containing a number of recommendations. Among them was one that each company adopt a system which would enable it to report unpaid accounts

sixty days old or more promptly at the end of each month, even though it might delay the closing of their customer ledger; and another that the members should not hold up reports to the Association pending any adjustments during the month following. (Vol. I, p. 595.) As indicative of how strict some members were with reference to extending credit, and how effort was made to instill a like spirit in others, we quote from the following remarks of Mr. Hilles (Dexter) made at the meeting of December 14, 1920:

It comes back to Jiggens' letter; there lies the key to the whole situation; and if we would only act upon that letter, *that suggestion of his, of never shipping a car of cement to a dealer, being able to say no when we have the information in our hands that that dealer owes another cement company right alongside, for cement bought over thirty days ago.* I have just been checking up, while we have not had any trouble in the past, I found five this morning; I am writing five letters to you gentlemen here asking for your experience. *If he owes me, and he owes you, and he owes that fellow, this man is automatically, with the writing of that letter, marked "no credit" on that day.* The minute that letter goes out, it determines "no credit." The salesman is advised by dictating that letter. The two processes naturally follow. My list is none too good. I have about sixty or seventy with four months' old stuff, and most of mine is with country dealers. But nevertheless during

the three or four months when we were shipping that cement, these fellows did not owe anybody else any money. When this spring season opens, I want to be very careful as to whom I ship cement. *I want to try to get myself to say absolutely no, no matter how badly he wants me to ship cement. If a fellow will write me I will tell him everything, what my experience is.* (Vol. I, p. 616.)

At that meeting there was an extended discussion relating to credit, and Mr. Tiree said:

Yes. It is not so much the sixty days, as we want to find those delinquents. If we have reason to know that such and such a party is going to be delinquent for the sixty days, and we shut off shipments to him, it seems to me entirely proper for us to put that on, and include it under the sixty days. (Vol. I, p. 619.)

And Mr. Christ (Coplay) said:

And over against that you have accounts of three or four months and you don't hold up shipments. Why not make some parenthetical explanation in a condition of that kind. (Vol I, p. 619.)

The discussion had finally reached the point where doubt arose as to whether they were in effect creating a "black-list," and Mr. Lober (Vulcanite) remarked:

I don't want anybody to get the impression that we are publishing a black-list. We are not. We want to have all the informa-

tion we can get, and yet we must always keep in mind the plan and the scope of the Association as expressed in the draft of the purposes which were printed at the beginning of the first minutes and the constitution and by-laws, that every company member is absolutely free to conduct his business as he pleases. (Vol. I, p. 619.)

The credit managers were manifestly wishing to adopt and enforce still more stringent regulations at the meeting of January 20, 1921; and in the absence of Mr. Lober, Mr. Hulsart was asked to read a report of the credit committee, from which it appears that a number of credit managers had held a meeting in New York on the 14th of the previous month and had then discussed matters affecting credit conditions. In the report certain extensions of the credit system were recommended; but before its adoption it was determined that the matter should be referred to the Association's attorney for advice as to its legality. (Vol. I, pp. 620-621.) Counsel in his reply expressed the view that the action contemplated was legal but inadvisable, because "there are numerous people trying to get a picture of the Association just now, and during that process any movement, however harmless in itself, is apt to obscure more or less the outline. . . . In brief, simply on the theory that it is not desirable to move when one is having one's picture taken, I suggest deferring action on these suggestions." (Vol. I, p. 622.)

IX MEETINGS

Article IV of the Constitution and Section 7 of the By-Laws provides that *the Association shall meet monthly*, "the time and place of each meeting to be fixed by the Association. Special meetings may be called whenever the President shall deem it necessary or upon request of five (5) members." (Vol. I, p. 358.)

The second paragraph of Article VIII of the Constitution provides:

Full and complete minutes of all matters discussed at any meeting of the Association shall be kept and such minutes, together with all records, files and correspondence of the Association, shall be preserved and held open at all times to any public official or other person who may have any legitimate reason for desiring to be completely informed concerning any or all the activities or transactions of the Association. (Vol. I, p. 357.)

And a stenographic report of all discussions and actions taken was kept; and the Association's counsel was present at every meeting to steer the discussion away from illegal subjects and to have them confined to matters strictly within the purview of the Constitution and By-Laws of the Association.

From the citations heretofore made to and quotations taken from the minutes of the meetings, it is apparent that the impelling force of those discussions toward cooperation can not be estimated.

But a further consideration of the minutes will show the absolute impossibility of confining such discussions to the subjects specified in the Constitution and By-Laws; and that through them agreements were reached, sometimes positively expressed but more often tacitly understood, which related to many of the most important practices of the industry. If, under the circumstances described, discussions of the character shown in the minutes of the meetings of the defendant Association occur, what their nature must be when had in the absence of all restraints can only be imagined. In the *Hardwood Case (United States v. American Column and Lumber Company, 257 U. S. 377)* the proof showed that the secretary, Gadd, requested from each of the members an expression of opinion as to the benefits they had received from the Association's activities. In reply, a number of the members freely described the benefits they had derived therefrom; and their testimonials not only were material evidence in support of the Government's contention in that case, but demonstrated exactly what results are accomplished by all trade associations which carry on practices of the character there proven. So here the minutes of the defendant Association are conclusive evidence, not only of what occurred in the discussions had by the members of the defendant Association, but also of the scope and nature of discussions which will naturally be had in meetings of all trade associations.

X

SUBJECTS CONSIDERED AND PASSED UPON BY THE ASSOCIATION OUTSIDE OF ITS CONSTITUTION AND BY-LAWS

On cross examination Miss Phalen, the Association's Secretary, testified:

The business of the Association is confined to dealing with these four subjects that have been mentioned, that is, specific job contracts, credits, freight rate books and statistics of production, shipments and stocks on hand. The business of the Association is carried out by getting certain information as to those four subjects, putting that information on printed or mimeographed reports and sending those reports to the members. The Association simply repeats or tabulates this information without drawing any conclusions from the information or making any suggestions in connection with those subjects. The Association is in substance simply a mechanical multiplying and tabulating machine. (Vol. I, pp. 161-162.)

The witness no doubt was conscientious in this statement; and if a full report of the discussions and actions taken at the meetings had not been kept, it would doubtless have been proven by a number of witnesses, and probably not contradicted, that the activities of the Association were confined strictly to the subjects mentioned in the Constitu-

tion. All of the subjects embraced in the Constitution have heretofore been treated; and now consideration will be given to matters with which the Association was supposed to have nothing to do whatever.

RETURN OF BAGS

This subject gave the members of the Association no little concern, because it is a matter of importance in the cement industry.

Cement is generally placed on the market in bags, the practice being to charge a certain amount for the bags when the cement is sold, and then allow the purchaser credit therefor when the bags are returned in good condition. The usual charge made for a bag is ten cents; and if the bag is returned in good condition the purchaser is reimbursed ten cents. The cost of bags to the several manufacturers must have varied widely, because some companies require, and are in a position to order large quantities of bags, whereas other companies require a comparatively small number of bags. The price of bags, along with everything else, advanced materially shortly after the war period. Some of the nineteen manufacturers must have been fortunate enough to have contracted for their requirements before the peak of prices was reached. However, regardless of what the bags must have cost, the various manufacturers all made identical charges therefor. Manifestly, leniency in the inspection and acceptance of bags returned is tanta-

mount to a rebate in the price of cement; and this question repeatedly arose in their meetings. Thus in the meeting of May 15, 1916, Mr. Lober (Vulcanite) said:

Do you desire any discussion as to the results of the tabulation of the bag figures for the last three months? There is a very great divergency in the percentage of rejections. The lowest here appears to be one-half of one per cent., and there is one here which shows nearly four and a half per cent., that one fellow rejecting nine times as many bags as the other, and the average is nearly two. Now there may be causes which will explain that. It may be that the companies which show very large rejections did not have very many new bags last year, particularly the latter part of the year. The companies which show the smallest percentages may have put in many new bags, and it may be that they shipped largely on contracts, where the contractors could take good care of the bags. But there is a most remarkable difference between the high and the low figures. The highest is apparently four and a half per cent., and the lowest only half of one per cent. There are about five who are below one per cent. We have never been able to get that low, even when we had new bags, and on the other hand we have never gone as high as four and a half per cent., when we had nothing but old bags. Perhaps it would have been just as well to have let it go a little longer. *The gentlemen*

who are not rejecting many, are the ones whom it ought to cause some study.

This is the first report, and we will have another report at the end of the next three months, and that will give us a little larger basis for averaging. (Vol. I, p. 484.)

At the meeting of February 20, 1918, a letter from the president was read by the secretary, which related to this subject. In the letter Mr. Mallory (Edison), the president, said:

I have already made a rough calculation which indicates that we are getting a smaller percentage than some of the other companies, and I will appreciate it if you will take the matter up and see if it is possible to obtain from each of the companies a memorandum showing the total number of cloth sacks which each company shipped during 1917; that is, eliminating the shipments in paper and wood, so that the percentages would be on a comparative basis.

If this information is available, it might be illuminating to some of the companies, as well as ourselves, if you would work out the percentage and send the results to each company. (Vol. I, p. 550.)

The secretary then stated that he understood what the president wanted was for the reports to show the number of bags *shipped* by each company and the number returned, as only the number returned was then reported. The Chairman inquired if any-

one had any objection to supplying Mr. Bacon (Secretary) with that information.

Mr. TWAMLEY (Coplay): I move that the information asked for in the letter of Mr. Mallory be supplied to the Secretary.

Motion seconded by Mr. Cover (Security) and carried. (Vol. I, p. 550.)

However, the discussion proceeded; and Mr. Scott (Giant) remarked:

Mr. Mallory's point is that our records show a tremendous number of bags outstanding in the customer's hands and we want to see if our records *show a larger number than the other companies*. In other words, we want to know the number of bags outstanding, so that we can provide for the future and so on. (Vol. I, p. 551.)

The motion which had previously been carried was subsequently modified as follows:

Mr. COOGAN (Alpha): I move to amend the motion to get these figures for the year 1917 and distribute them.

Mr. BROBSTON (Dexter): May I make a suggestion that the reports show the total number of bags shipped for 1916 and 1917. Wouldn't it be interesting to have the total number of bags for both years?

The CHAIRMAN: The idea then is to supply Mr. Bacon with information showing the shipment of sacks during the years 1916 and 1917, with the amount of sacks returned.

Motion seconded by Mr. Jiggens (Giant) and carried. (Vol. I, p. 551.)

At the meeting of November 19, 1918, the method of counting bags was discussed, and Mr. Gaines, Vice President of the Association, said:

I secured that information and sent it back to the members in the form of a *statement showing the method each company used in counting sacks, whether before cleaned or after cleaned.* That report has been made to the members, and we can incorporate it here as a part of the records of this meeting. (Vol. I, p. 575.)

In the minutes of the meeting of April 17, 1919, it appears that the Credit Committee had met and held a meeting the night before, and had discussed a number of trade practices; and with reference to the question of bags returned, Mr. Lober (Vulcanite), who submitted the report, said:

Another matter that was discussed last night was the question of sack returns, the great variation which is shown in the rejections as between various member companies.

The credit managers felt that the variations were larger than they should be, and that something might be done to reconcile those differences, and they would like to have the office here take up that question with the various companies and find out which man in each organization is directly connected with that work, and see if it would not be possible to have a meeting and discuss these differences *and find out if there was not some way to have some more uniform method of inspecting return sacks so that*

the results would be comparable instead of showing such an enormous variation. (Vol. I, p. 596.)

After some further remarks the following colloquy occurred:

The CHAIRMAN: Do you think it possible, Mr. Lober, that instructions could be issued, or any plan formulated, whereby the men inspecting sacks—different men in different companies inspecting these sacks—could determine what was a good sack and what was a bad sack. Does not the human element enter in there to a great extent?

Mr. LOBER (Vulcanite): It enters into it to a very great extent, but it seems to me the differences as they are now are too great to be entirely covered by the personal equation. Possibly by discussion we might draw up some standard rules for inspection which would tend to make it somewhat more uniform. I do not know whether we could or not. (Vol. I, p. 596.)

After remarks by Mr. Dutton (Bath) and Mr. Lober, the Chairman again said:

I think you will find that one reason for that variation is that some companies allow credit for any sack which can be repaired and used again, and others do not. (Vol. I, pp. 596-597.)

Mr. Lober in closing his reply to this remark, said:

I do not know whether anything can be worked out on that line or not. I might say

that the same matter was put up to the Package Committee of The Portland Cement Association, to try and work up something in the way of a specification or a set of rules for inspecting, and possibly testing, return sacks which would as far as possible make that inspection at the various mills uniform.

The CHAIRMAN: Has any one any suggestion as to how that could be done?

Mr. DUTTON: My candid opinion in this whole matter is this, that with some of the companies the sales department has too much to say regarding bag credits. I know it is very easy for a company to have certain accounts which they do not want to lose where there were complaints coming in of bag credits, to overlook and go ahead and give them a credit that they were not entitled to. I feel that this is largely due to the selling end of it that that is done, because I cannot conceive why there should be this big variation in bag credits if it was left entirely to the operating department and the credit department in the mills. (Vol. I, p. 597.)

At the meeting of June 19, 1916, the following discussion occurred with reference to allowing a discount when the purchaser remits check, less the amount of bags returned, when the bags have not yet been received:

Mr. MEDLER (Atlas): I should like to get an expression of opinion from the meeting

as to what is considered good practice in the way of a bill of lading covering bags in transit not yet received when taking the cash discount. To put a concrete illustration, supposing a man has shipments until the 15th of the month and promptly on the 24th or 25th, within the discount period, he sends his check, the amount of the invoice would be, say \$250, his check would amount to \$150 and he encloses a bill of lading for enough bags to make up the difference after deducting his discount. Now, it has been my understanding that it was not considered cash payment to take a bill of lading, for bags in transit, and I have sent these checks back. The wrath I have brought down upon me has been so severe *that I would like to know what other members of this meeting have to say on the subject before I know whether or not to stand by my guns.*

Mr. ISRAEL (Coplay): It strikes me Mr. Medller's practice is exactly right. Anything else merely means the customer is setting himself up as a judge and jury to decide every bag he sent was in splendid condition and was all right and a full credit must be allowed for the same.

Mr. MEDLLER: Of course we would adjust our differences when received at the mill.

Mr. ISRAEL: This is simply another controversy. I will stick by what I said, that you are absolutely right. See what the others think about it.

Mr. GRIFFITH (Giant): Gentlemen, this is a very interesting subject, allowing credit for bags on the way in settlement before they are received at the mill.

Mr. ISRAEL: See what each one says about it.

Mr. LOBER (Vulcanite): Mr. Medler's question is not what we ought to do, but what we are doing?

* * * * *

Mr. LOBER: Mr. Medler brought that discussion up at one of our meetings. I looked into it, and it occurred to me possibly our customers were doing that. I knew there were deductions made for sacks. I looked it up and found occasionally there were cases of that kind and our cashier had been accepting on account and holding up the receipt until we got the sacks, and they were all right. *We want our practice to be the same as the others.*

Mr. ISRAEL: *Gentlemen, I hope this practice will become universal—not to do it, as really, it is almost impossible to differentiate between allowing a check which was sent and which would not be received until long after the discount period and allowing for cement bags sent and which you do not receive until after the discount period.*

Mr. GRIFFITH: *It seems to be unanimous they have not been allowing credit for bags on the way.* (Vol. I, pp. 493-494.)

At the meeting of October 16, 1916, the question as to the return of sacks to customers when demanded by them was under discussion, and the president said:

The gentleman who brought this up wanted to get the feeling of the different members as to how they were handling this, *and it seems to be the general consensus of opinion that in the future*, when a customer asks to have bags returned, we will put them in the next car of cement that is shipped, and so state it on the bill of lading. Is that the feeling of the members present? (Vol. I, p. 514.)

At the meeting of May 21, 1917, the question considered was thus stated by Mr. Medler (Atlas):

I would like to get an expression of opinion as to what the members would consider good practice in accepting bags after a long delay in transit for discount purposes.

Thereupon the president remarked:

I think that is an important matter we should give some consideration to. In regard to the return of empty bags, you are aware that at present railroad conditions are such that bags do not come back with promptness, and some important customers who discount their bills do not get a credit memorandum for bags returned as it may be a month or six weeks or some such time before they are finally returned to us. (Vol. I, p. 527.)

After some discussion the following exchange of views and action by the Association was had:

Mr. COOGAN (Alpha): I think we would make a mistake in changing our present rule.

Mr. MEDLER (Atlas): I am rather inclined to agree with Mr. Hilles that when a man presents a bill of lading we should take in good faith that he has made such shipment. Our company has not had much trouble except in one or two cases lately, and I think myself that there may be cases where individual judgment may be used.

Mr. WALTER (Lehigh): I think if we did make an exception in one case it may be possibly only postponing trouble with other customers.

Mr. DUTTON (Bath): I believe if we make exceptions it would only lead up to chaotic conditions and disputes. If a customer finds out we made an exception in one case there is trouble right away.

Mr. COOCAN: I think it would be better to leave matters remain as they are, and I would therefore move that this meeting reaffirm our present policy so far as the handling of empty bags and bag credits are concerned.

Motion was duly seconded and carried.
(Vol. I, p. 528.)

At the meeting of July 16, 1918, the following discussion occurred with reference to exchanging sacks between the companies:

Mr. LOBER (Vulcanite): I have a matter I would like to get an expression of opinion on.

I have received from a number of the companies, letters in regard to the intercompany sack exchange basis—foreign sacks, I believe we could discuss that here as to the desirability of a change, and as I know that some of the members have been making that change, it seems to me we ought to have a uniform practice—all of us.

The CHAIRMAN: I think Mr. Lober has brought up a matter which we are all very much interested in at present. I would like to hear from some one what his views are in the matter. Mr. Griffith, have you anything to say?

Mr. GRIFFITH (Giant): We are still holding to the old rate of five cents. I feel if we raised that price it would only imperil the matter.

The CHAIRMAN: How do you feel about it, Mr. Twamley?

Mr. TWAMLEY (Coplay): I understand the question is the amount to be paid for sack exchange between manufacturers.

The CHAIRMAN: Yes.

Mr. TWAMLEY: I feel in view of the present cost of bags that that amount is too small. I think a rate of ten cents would be an improvement.

The CHAIRMAN: The big drawback in making a change in the interchange value of sacks, of course, is for the reason which Mr. Griffith brought out, but I doubt it would amount to as much as we possibly think it would. Mr. Griffith remarked that changing the price of sacks for interchange

between mills from five cents to ten cents would encourage customers in returning all their sacks to one manufacturer. How do you feel about that, Mr. Coogan?

Mr. COOGAN (Alpha): We prefer the five cents. We agree with the remarks that have been passed here that if we go to ten cents there will be a great deal of abuse. We do not see any reason why there should be a change.

Mr. MEDLER (Atlas): We are paying five cents now and I do not think we care to change that. We do not like to handle foreign sacks; they are expensive and troublesome. We cannot get enough labor to count our own sacks and we do not want to bother about turning over that labor to take care of the other sacks. We do not think we ought to change from the five-cent basis. (Vol. I, pp. 564-565.)

DISCOUNTS.

This is another subject which was repeatedly discussed at association meetings.

At the meeting of March 20, 1916, Mr. Walters presented a card to be given customers which contained a succinct statement as to terms of discount, and which was the subject of lengthy and very favorable comment. The principal point of discussion was whether the time of payment to obtain the discount should be within the stated period from the *date of shipment* or *date of the receipt* of

the cement. In the course of the discussion, the president said:

It was intended, this five cents on a barrel, it was absolutely intended to receive payment within ten days from the date of the invoice. And I think it is a very important thing that we try to hold to that arrangement, and the suggestion of the Lehigh Company seems to be a very good one.

Mr. ISRAEL (Coplay): Mr. Chairman, would there be any objection to having that card copied and a copy sent to every member by the secretary?

The PRESIDENT: I don't see any harm for the same verbiage, practically, being used and sent out by all the companies to their customers calling their attention to the fact, that this Association is giving them a discount for a payment within ten days and holding them to it, not eleven days or twelve days or thirteen days but holding them strictly to the account of within ten days' period. (Vol. I, p. 448.)

* * * * *

Mr. LOBER (Vulcanite): I was just about to make the same suggestion as Mr. Israel. We all would like to have a copy of that card. So far as we are concerned I am going to have a similar card printed and used in our business.

Mr. JIGGENS (Giant): So am I. (Vol. I, p. 448.)

Mr. Israel (Coplay) remarked:

The card strikes me so admirably and it is worded so concise and so clear and emphatic where this discount will be allowed that it is a question in my mind whether it is possible to improve it any. I made the humble suggestion that the words "not ten days after the arrival of the goods" might be underscored in red ink because that would strike anyone in the eye that read it, it would strike them right in the face and they could not very well get away from that. (Vol. I, p. 449.)

And after further discussion, the following views were exchanged by the members:

Mr. CORBETT (Alsen): The United States postmark would be a good guide because there are constant evasions, and if we don't start that thing at the very beginning with absolute strictness there will be one, two or three different delays that will be worked or tried to be worked on you, where they will try to get some extra days in which to have the discount allowed, all of which would be very unfair but which will be very hard to detect and very hard to meet. Whereas if we have something of this kind stated in advance as a guide it might make it easier to meet.

Mr. ISRAEL: Suppose we enter the words "Remittances will be considered as of the post mark on the envelope containing the remittance."

Mr. CORBETT: That is my suggestion, something to that effect.

Mr. LOBER (Vulcanite): Mr. Israel, that very point, the date of the invoice might be taken care of by making that read "The date of the shipment from the mill" which would be the same as the "date of the invoice" with us, and I imagine with most companies.

Mr. COVER (Security): As shown by the bill of lading.

Mr. LOBER: As shown by the bill of lading, yes. There is a point in connection with that cash discount time which I think most of you remember was brought out by the trade relations' committee of the other Association. They say that their counsel—I don't know which company's counsel, but I think it was the Universal Company's, advised that if a cement company as a general proposition held their trade closely to the ten days' time from the date of the invoice in allowing the cash discount deductions and then made one or two exceptions, allowed a customer here or there to take extra time on his bills under one excuse or another, that the car did not arrive, or that they were entitled to ten days from the date of arrival and so forth the statement was that the company was in effect discriminating in favor of such a customer by practically granting them a lower price, and that that was discrimination under the terms of the Clayton Act and illegal. I don't know how that would stand at law, but it is not a bad argu-

ment to use on your customers. I have been using that with very good effect in a number of instances but I don't know how that would go, if we ever should go to court with a court case on that question, I don't know how that would come out.

Mr. COX (Counsel): I don't know as you would have any difficulty with it, it is good doctrine to help out with anyway if you can make them believe it. (Vol. I, pp. 450-451.)

And the discussion closed with the following:

Mr. WALTERS (Lehigh): Now, as for these cards, if it would save the secretary some trouble I might send in a supply so that he could send them out if you desire me to do so.

The PRESIDENT: We would appreciate that very much.

Mr. LOBER: That would make it much easier for the secretary.

Mr. ISRAEL (Coplay): It might be a good idea to send out also this idea on a slip of paper of a discount of so many dollars and cents that would be allowed if the invoice is paid on or before a certain date. *That will remind us all over again of that idea.*

Mr. MATTHES (Alpha): I am having those printed at the present time, I have not got them in the office yet. My intention is to use them as soon as they come in.

Mr. ISRAEL: One of those enclosed as a sample with these cards, it would remind us all again of that idea.

The PRESIDENT: Have you anything to say on the subject further?

Mr. COVER (Security): You will send these to the secretary?

Mr. MATTHES: As soon as I get them I will be very glad to do so. (Vol. I, p. 452.)

At the meeting of May 15, 1916, as to whether payment by note should be considered such a payment as to justify an allowance of discount, Mr. Lober (Vulcanite) said:

There is a matter that I would like to get an expression on. It has been reported to me that some of the companies in our Association have been accepting notes from their customers, the notes may be thirty or sixty days, the time makes no difference, but the notes read "with interest", and they are sent in to the customer on an average of ten days from the date of the invoice, and some of the companies have been allowing their customers to pay their bills in that way, less the cash discount. I would like an expression from the members here as to the propriety of that method of settlement. I want to say that I personally do not believe that that is proper. I think that the discount is for cash. It may be stated that in sending in a note with interest, the customer can say that you could take the note to the bank and discount it and get the full amount of cash that he would otherwise pay you for your bill. That is true, but the customer is using your credit to get the money, and not his own, and I do not think our companies' credit is for the use of the customer in that

way. I think the customer should use his own credit, and get the cash, if he has to get it, in that way.

The PRESIDENT: The question is open for discussion. (Vol. I, pp. 482-483.)

After some further remarks, the discussion proceeded as follows:

Mr. MATTHES (Alpha): I had an experience recently where a certain contractor wanted to purchase through our dealer, and he said he would buy Alpha cement, provided the dealer would accept from him his notes and allow the discount, and the dealer put the proposition up to us, and we turned it down, and the contractor and dealer both said they could get that accommodation from two of our member companies, and I told our traveling man that we would not agree to it, and they put it up to two others of the member companies, who turned it down also, and the final result was that the business came to our company, and we are getting our payments on a straight ten days cash payment basis.

Mr. LOBER (Vulcanite): We were one of the other companies that had that proposition put up to us, and we wrote the man that made us the proposition that we would not do it. That if he had to take those notes he could take the notes to his own bank and discount them and get the money, and that we could not permit our credit to be used in that way.

Mr. ISRAEL (Coplay): The same thing was tried on our Company, in three or four ways, and we turned the matter down at once.

The PRESIDENT (Giant): *Is there any one in the room that feels that they would do a thing of that kind, or is it the general consensus of opinion that they would not do it?*

Mr. ISRAEL: *I am willing to declare myself, and I say no.*

Mr. GILKYSON (Phoenix): *I have not heard of any such a thing.*

Mr. WALTERS (Lehigh): *I did hear of a case of that kind, and I was in touch with Mr. Matthes, and it is something that the Lehigh Company would not tolerate.*

The PRESIDENT: *Is there anybody in the room who would be in favor of doing such a thing?*

No one declared himself as in favor of this method. (Vol. I, pp. 483-484.)

At the meeting of September 18, 1916, the question of allowing a customer discount when he has a past due account was discussed at great length. It began as follows:

The PRESIDENT (Giant): The subject we were talking of in an informal way, I think we can now have formally discussed, and that was, with reference to the five cents a barrel discount. Whether that should only be allowed to customers who did not owe you overdue accounts. That I think will be inserted in all the forms in the future, but, in

the meantime, it is open for discussion, gentlemen.

* * * * *

Mr. HILLES (Dexter) : I am satisfied.

Mr. ISRAEL (Coplay) : There are some gentlemen who have entered the room since we had the informal discussion upon this subject, which was informal only because we had no quorum. At a certain given time we had a quorum, and then the matter was brought up by the Chairman, and I made this motion. Now, if the full import of my motion is not clear to anyone who came in the room since this all began, I want simply to say a few words, namely, that the question was put by Mr. Medler, of the Atlas, what do the gentlemen of this Association consider, or what do the companies of this Association consider is the proper practice in a case where a purchaser owes past due accounts—in other words, past accounts overdue—and he undertakes to settle with you those past due accounts by giving you a note or acceptance—I mean, of course, for a certain running time. Does that settlement wipe out his past due accounts, so that he no longer stands in the position of owing past due accounts? Has the situation now been created where there exists no past overdue accounts, and he is, therefore, entitled upon any purchase he may make to the cash discount? Or does he stand in the position of one who owes a past overdue account, and, therefore, is not entitled to the cash discount, because our terms

are, that only such purchasers are entitled to the cash discount who do not owe any past overdue account? Therefore, so as to bring the matter formally before you for discussion, so that no misapprehension will exist arising from it, *I made the motion that it is the sentiment of this Association that one owing a past overdue account is not entitled to the cash discount*, and that a settlement so called, made by note or acceptance, shall not be considered payment of that overdue account, or to repeat, that a purchaser shall not be entitled to the cash discount if a past overdue account remains unpaid, and a settlement by note or acceptance is not payment of that overdue account.

Mr. COPE: May I ask if this is with reference to future arrangements?

Mr. ISRAEL: Sure.

Mr. COPE: Because there are cases, some of us have been talking about where some dealers have a plan to settle their past overdue accounts with a number of cement companies and get on a new basis. (Vol. I, pp. 502-503.)

The discussion was conducted on both sides with marked ability, every phase apparently both for and against the allowance of discount under such circumstances being presented. It finally ended by motion of Mr. Smith (Lawrence) to lay the question on the table so that the consideration could be renewed at a subsequent meeting. (Vol. I, p. 508.)

The subject was again considered at the meeting of October 16, 1916, when the following colloquy occurred:

* * * As this seems to be rather an important question, I would like to learn the feeling of the members present, as to whether they are allowing the discount if a customer owes you an account still overdue. There was a great deal said at the last meeting, and we would be glad to hear anything further you may have to say.

Mr. COOGAN (Alpha) : My understanding is, that no company makes a general practice of doing that. I believe that there are some who do it, but not all the companies.

Mr. LOBER (Vulcanite) : I was not present at the last meeting, and all I know about it, is, what I read in the minutes, and, perhaps, it might be proper for me to make a statement of what I think should be done and what we are doing, because I was not present.

In the first place, in looking over that discussion in the minutes, it seems to me the gentlemen who talked took two different standpoints. Some talked from the Sales Department standpoint, and some from the Credit standpoint, and the difference of opinion came right there.

As far as we are concerned, we believe, from the credit standpoint, that a customer who owes an overdue bill is not subsequently entitled to the discount on his current bill.

As a matter of fact, when a bill comes due in thirty days we are entitled to our money,

and when that customer discounts a later bill in ten days, he is using your money to discount your bill. That is the way we feel about it.

Now, on the other hand, the dealer on a great deal of business—carload business—only gets five cents a barrel profit. There will occasionally crop up instances where a dealer, who is reliable, may be, perhaps, sixty days overdue, and for some reason he is unwilling to take the discount on his regular bills. He may not be in a financial condition to do that. Possibly, he can't borrow the money, and yet he still wants us to continue selling to him. We feel that it is safe to continue selling him carload lots, and, in the meantime, he continues to sell cement to a contractor on a certain job, and that contractor may insist on his having the five cents in ten days, because he could get it from the cement manufacturer if he bought direct. That being the case, if the cement dealer does not discount his bills on that job, he gets no profit. Now, those particular instances, so far as I can see, have got to be handled each on its own merits. I don't think it is right that the man should have the discount when he owes an overdue bill, but, as I say, if you don't make some sort of an arrangement, by offering him a special commission, or whatever you chose to call it, he has got to handle that particular contract, or carload, or whatever it may be, without any profit.

Now, we have in some very few instances allowed the customer or dealer to discount some bills for that particular reason, and no other, when he has had an overdue account. (Vol. I, pp. 510-511.)

Mr. Jiggens (Giant) after stating that counsel had advised his company that under the wording of its quotations customers had a right to the discount on bills even if they should owe an account which had run for more than thirty days, said :

That seems to be the crux of the whole thing, whether you gentlemen want to change the wording of your quotations and contracts, or whether you want to leave them as they are, and settle for yourselves hereafter as to whether you will accept the discount or not.

* * * * *

The PRESIDENT (Giant): You have heard the remarks of all the members present in reference to their feeling in this matter, and it seems to be the consensus of opinion that it is advisable to endeavor to change the wording of their quotations and contracts, if it has not already been done.

Mr. COOGAN (Alpha): Now, Mr. President, I would like to ask if this is not a matter that is entirely outside of the scope of this organization? Isn't it a matter for the general association? For example, suppose this organization does pass a resolution recommending the adoption of that clause, what are you people going to do with your com-

petitors in the Mid-West, provided the Mid-West do not see fit to adopt such a clause? If we are to have uniformity, the simplest way would be to pass it, the same as this organization, but we don't know whether or not it is going to be adopted generally, or not. In fact, I am in a position to say that I don't think myself, the resolution will be adopted in the Mid-West.

Mr. HILLES (Dexter): I don't think this is a resolution. It was merely an expression of opinion.

Mr. COOGAN (Alpha): The President said it was the consensus of opinion to do so by adding it to the forms.

The PRESIDENT: If the individual company sees fit to do so. Not as a resolution.

Mr. COOGAN: I think, by all working together, you will do more real good and get good results, but I do not think you will get good results simply by adding that to the forms. We know there are cases that it simply would not cure, and it does not seem to me like good business.

Mr. HILLES: I, therefore, suggested this expression of opinion, which was not to be regarded as a resolution, but simply as an expression of opinion, and if the Resolutions Committee of the Protective Association desire to take it up, all well and good. If not, no harm is done.

Mr. COOGAN: I think that it weakens your position, because you gentlemen all admit that there are cases where you have got to

make an exception, and that they come up, in the general run of business, very seldom. I don't see where you are going to strengthen matters by an expression of opinion.

The PRESIDENT: We feel that we should put the clause in, regardless of whether any other companies do it or not, because we consider that it is essential to our collections, and it is simply a matter for each company to decide for themselves, not as an association matter, but as an individual matter. (Vol. I, pp. 511-512.)

TRADE ACCEPTANCES

At the meeting of June 19, 1916, the Committee on Trade Acceptances made its report, in which it recommended a careful study of the system by each company as affecting its individual trade; and while the Committee unanimously favored the practice involved in the general use of trade acceptances and believed that it would eventually become universal, no radical changes were recommended at that time. (Vol. I, p. 488.) The report stated:

The value of a definite plan providing for the use of trade acceptances can be readily understood by reviewing the following advantages:

and seven advantages were enumerated. (Vol. I, p. 488.)

In commenting on the report, Mr. Lober (Vulcanite) said:

. . . so after threshing it all over, as I say, altogether for about a day and a half,

we came to the conclusion that we had better recommend no specific terms—or time, rather, and that it would be more a matter for each individual company to try to work the thing out for the present until it had come into more general use and probably better understood among the trade *and we would then possibly be in a position to arrive at some uniform method of settlement by means of trade acceptances for those accounts which were not discounted.* (Vol. I, pp. 489-490.)

The following views were then expressed:

Mr. SHEPPARD (Lawrence): Mr. Chairman, if we suggest sixty days' acceptances, are we not, the cement companies, starting a movement *that will nullify the thirty-day term?*

Mr. GRIFFITH (Giant): If we send out 60-day acceptances our terms will then be 5¢ per bbl. discount in 10 days or 60 days net.

Mr. SHEPPARD: *If we could get together on terms,* make our terms a little longer than they are, net terms of sixty days instead of thirty days, there would be no objection to a sixty day acceptance.

Mr. BROWN (Alpha): It seems to me the committee did not realize that they were actually proposing to extend our terms to sixty days. The first proposition offered to me, was nothing in the world, as I look at it, *but changing our terms from thirty to sixty days. I have either been fortunate enough or unfortunate enough to have gone through*

the period of changing from sixty to thirty-day terms, and I do not want to see anything done by the credit men of the cement industry that will in any way tend towards the sixty-day terms. I think everything done should be along the line of making it a cash basis and not a credit basis, and where credit is given to customers, they should pay interest. (Vol. I, p. 490.)

* * * * *

Most people won't pay interest unless they are forced to through the courts, and I don't believe—I want to emphasize this—we ought to do everything to indicate thirty days is long enough for a man who buys our cement. I ask you all to do that. I tell you, gentlemen, it is a step backward, a back step. It took us years to come from sixty to thirty days and we don't want to go back from thirty to sixty days. (Vol. I, p. 491.)

* * * * *

Mr. ISRAEL (Coplay): I am not informed of the discussion that took place at the meeting of the committee, and I may be saying something that certainly occurred to them, and they threshed it out thoroughly and came to the conclusion there was not anything in it, and if I am guilty of doing that, it will be done honestly. When Mr. Brown addressed himself to the proposition of sixty days, and I fully agree with him that we ought not do anything in the world *to get back to sixty days after that struggle we had to get near thirty days*—**Mr. Hilles** promptly replied, was there anything in the report

about a sixty-day acceptance; then it occurred to me how would it work out to let the purchaser of the goods have the alternative of discounting, getting five cents a barrel off and giving a thirty-day acceptance? I would like to hear some members of the committee on that, that is, whether they did discuss that and if they did and turned it down, why? (Vol. I, p. 491.)

In the discussion, Mr. Medler (Atlas) remarked:

Then, finally, the thought came we have not tried out for one season the five cent a barrel discount, *and the conclusion was to work a whole season under the five cent discount and see at the end of that period just what percentage of those customers remained slow pay.* We may then take some very effective means of correcting whatever abuses there are in our terms of sale.

Mr. ISRAEL (Coplay): *The last suggestion seems to me pregnant with good sound meaning and sense.*

* * * * *

I think the sensible conclusion to come to is to let's try it out and see, and then perhaps, after a while, the ones discounting will be great in number, and those who do not will be insignificant.

Mr. GRIFFITH (Giant): *If that is the feeling of the members I suggest the matter be referred back to the Committee to report at the next meeting.*

Mr. ISRAEL: *If the idea is to try out the five cent discount and see how that works*

for a whole season—which I think is an excellent idea, as I said, why not lay this report on the table and then we can take it up any time we please, three, six or nine months from now. It won't require the appointment of another committee to report. We can take it up any time. I move the report of the Committee on Trade Acceptances be laid on the table.

Mr. GRIFFITH: *All in favor say aye.*
(Ayes.) (Vol. I, p. 492.)

But after this motion had been carried, Mr. Lober (Vulcanite) remarked:

I want, before leaving the subject, to repeat what I think I said in my former remarks when you asked me to say something for the Committee. The Committee feels that for the present, at least, *it would be desirable that the trade acceptance matter be pushed by individual effort of the companies, and we could then see later on what success the individual companies who tried it, had with it, and that would undoubtedly be a help in arriving at some uniform method of using the acceptances when the Association feels they are ready to adopt some such method.* I know some of the companies are using them, some of them intend to try them, and I hope as many as possible will try them out during the summer, and after we have had this season's experience with the five cents discount and get to the point where we will know more closely how many customers will discount and how many will not,

we can then take up the trade acceptance matter much more intelligently and will have more experience. (Vol. I, pp. 492-493.)

EXTENSION OF CREDIT

A discussion closely related to and partly involving trade acceptances was that of extension of credit, and upon that subject at the meeting of May 15, 1916, Mr. Jiggens (Giant) said:

I believe that if the question was asked of the credit man, "Why do you allow Smith to take five months in his settlements?" the reply would doubtless be "That is the best I can do with him," and if you ask, "Why do you continue to sell him?" the reply is likely to be "Because if I don't, some other fellow will."

The long extension of credit granted is practically a rebate, and is, in my opinion, equivalent to a reduction in price, or full allowance for all bags returned. It does seem that so long as credit terms are thirty days, that extensions should not be granted over a period exceeding sixty days from date of shipment.

The times are opportune for us to try and get settlements on a business-like basis, and be willing and courageous enough to suspend shipments when terms are generally extended as before mentioned.

The Trade Acceptance form, as suggested by the Federal Reserve Bank, is likely in time to become more generally adopted in a number of industries, and it does seem

that now, that we have a Cement Protective Association, we should be able to help forward this movement, which not only will tend to guard against over-buying, but will also obviate the necessity of the salesman and credit department dunning for money. Where we are dealing with customers who always discount or pay promptly in thirty days, there would be no need of using the acceptance, but where settlement dates are invariably uncertain, an acceptance sent with bill or monthly statement might result in material benefit.

Mr. ACKERMAN (Lawrence): Do I understand that no one is to be sold to who does not agree to this sixty days?

Mr. JIGGENS. No, the terms are now thirty days. IF WE GRANT SIXTY DAYS WE ARE GRANTING A MAN A HUNDRED PER CENT MORE THAN OUR REGULAR TERMS, and IF WE ALLOW HIM TO TAKE FOUR AND FIVE MONTHS, to settle his bill, IT IS EQUIVALENT TO GIVING HIM A REBATE. (Vol. I, pp. 479-480.)

The discussion ended with the following:

Mr. HILLES (Dexter): That is what I was going to propose, but some of the gentlemen are not in favor of that. But that is good policy, and proper trade practice. *Can we not establish it as a basis of working, approved by us all, that it is the sense of the members of this Association that all accounts over thirty days, when written to, shall have called to their attention that there is in existence a form of discount which they*

can take advantage of, and in the event of their not taking advantage of it, that we would take steps to attach the trade acceptance to the next statement that we send, or to introduce it in some proper way to be outlined by the committee. I have written perhaps fifty letters in the last year, along those lines, and none of them have exactly satisfied me, and none of them satisfied the fellow I wrote to, *but I think we can formulate some general method that will satisfy everybody.*

The PRESIDENT: I would like to hear further discussion on this subject.

Mr. HILLES: I have been trying to digest some of the remarks that I have heard, and I move that a committee be appointed to consider this very important subject that Mr. Jiggens has proposed, and report with one or more plans at our next meeting, some method of recommended procedure.

Motion seconded and carried unanimously.
(Vol. I, pp. 481-482.)

BIN CHARGES

A very interesting and significant discussion was had in relation to bin charges at the meeting of March 20, 1916. This subject was introduced by the following remarks by the president:

Gentlemen, it has been suggested by a certain member of the Association, that some definite action be taken in reference to the bin charge, and that the wording on all quotations—there should be some wording on all quotations stipulating that if cement

is to be held and tested on the mill that it is to carry a charge of 3 cents a barrel. I should like to have the feeling of the members in reference as to whether it would not be a good idea to have on all quotations, wording something as suggested by this member. *Would it not be well to have a 3 cents a barrel charge put on, call it a bin charge, on all quotations on cement held at the mills.* That is a particular statement which is made to me, that there should be a charge made and stated in the quotation as a bin charge. (Vol. I, p. 456.)

Thereupon Mr. Israel (Coplay) suggested that the subject did not come within the purview of the Constitution and purpose of the organization and said:

I would like the chairman to solicit the opinion of our counsel who is present and be guided in that respect.

Counsel remarked:

I think the point of order is really well taken. It is not within the constitution and by-laws. (Vol. I, p. 456.)

Thereupon Mr. Brobston (Dexter) said:

Mr. Chairman, I might suggest that possibly I might bring that motion or suggestion within the proper limits of the discussion of this meeting, if it was simply made that a statement of any charges that are made for the bin charge should be included in the form of quotation we are using *for the purpose of securing a uniform quotation:* That any

charge that is made for holding cement in bins should be noted on that quotation sheet. Would you feel that that would come within the proper limits, Mr. Israel? (Vol. I, p. 456.)

And after some discussion of that phase of the subject, the following colloquy passed between counsel and some of the members:

Mr. COX: Well, does not that rather relate to the trade practices with which the other Association deals, than it does with anything that we are doing here.

Mr. ISRAEL (Coplay): No, the members of this Association all of them are selling cement. Now *in quoting they desire to have some uniform practice in that respect.*

Mr. COX: Yes, but thus far, as I understand it, this Association has not had anything to do with trade practices. That has been left to the National Association which has been drawn up in a sort of educative form of quotation, etc.

Mr. ISRAEL: *Well, we do deal with business practices of this kind; we decide that it is a good thing to accelerate the collection of our accounts, to allow a discount of five cents a barrel.* We decided that it is a good thing in order to protect ourselves against incurring indebtedness, uncollectible or partially so, to exchange information as to our experiences with the different persons to whom we sell; we adopted that proposition, and so it seems to me it falls under the business practice.

Mr. Cox: The point I make of that is that is a matter of the National Association, which deals with these trade practices. Thus far we haven't dealt with them at all as an Association. It is upon Page 10 of the report of the committee on trade conditions of the National Association.

Mr. BROBSTON (Dexter): Mr. Chairman, I think this matter is absolutely very clearly pointed out and the suggestions as made are certainly covered in the objects of this Association. The object of the Association is *for the collection and dissemination of such proper information as may serve to protect each manufacturer against misrepresentation and imposition and enable him to conduct his business as he feels he should do so free from exaggeration and the influence of false and insufficient information.* IF WE DON'T KNOW WHETHER A QUOTATION INCLUDES A CHARGE FOR A BIN TEST OR DOES INCLUDE A CHARGE FOR A BIN TEST, WE CERTAINLY HAVE INSUFFICIENT INFORMATION; and this is an effort to see whether we do have proper information as to whether a quotation be so made as to include a bin charge or whether it does not. It certainly seems to me that comes within the scope of this Association. (Vol. I, pp. 457-458.)

And after further remarks passing between counsel and Mr. Brobston (Dexter), Mr. Israel (Coplay), and Mr. Dutton (Bath), the discussion proceeded:

Mr. BROBSTON: I read from the by-laws of the Association which says: "To keep us

free from misdirection by false or insufficient information." *I only want the members of the Association to be able to put themselves in a position where we won't be getting insufficient information in regard to other contracts of other people.*

Mr. ISRAEL: Suppose you were to go to a dealer and he were to say to you that Company X had quoted him a certain price whereas in truth and in fact this was not so. Perhaps no price was quoted at all, perhaps a greater price was quoted than what the dealer stated. That would be false information and whether you would have a right to protect yourself against that or not is a matter which involves a question I would like Mr. Cox to answer.

Mr. BROBSTON: I will put it in another way then, in reply to Mr. Israel's statement; we are reporting these quotations or contracts as they are made to the Association. *We certainly should have our contract in form, so that we can tell whether it has a bin charge attached to it or whether it does not have a bin charge attached to it.*

Mr. ISRAEL: Now is there any objection to that?

Mr. COX: *No objection at all to include in the report that you are now making the Association, any information as to whether the price that is reported includes bin charges or not.*

Mr. ISRAEL: Now we have it.

Mr. COX: But when you speak of a quotation distinct from a transaction heretofore

which *had been* recorded, you open another and a different field.

Mr. ISRAEL: That is right. Suppose, Mr. Brobstom, you be kind enough to make a motion then that the records sent to the secretary shall state as to closed transactions whether it includes the bin charges or not?

Mr. BROBTON: I move you, Mr. President, that the reports sent to the secretary of the Association shall state whether they include a charge for bin testing or not.

Mr. COVER (Security): I second the motion.

Mr. COOGAN (Alpha): Would that be necessary on every job that I report on, every contract that we report, to make a notation on it, if it does include the bin charges?

Mr. BROBTON (Dexter): I should say not, I should say that when you reported a contract that included bin charges, you specifically should say so.

Mr. COOGAN. The omission to state whether you include bin charges or not would mean what?

Mr. BROBTON: *If nothing is mentioned, it is assumed there is no charge for bin testing* because if we adopt this motion that the bin charges should be specified, why then they would be stated if any were included.

Mr. ISRAEL (Coplay): The only report made to the secretary for the bin charges or testing charge, that is if there is one, it shall be so specified and so stated, is that right?

Mr. BROBSTON: That is correct.

Mr. ISRAEL: I will second the motion.

The PRESIDENT: Gentlemen, you have heard the motion. All those in favor will say "Aye." (Ayes.) Contrary "No." So ordered. (Vol. I, pp. 458-459.)

Thus precisely the same result was accomplished in a way different from that first proposed; that is, it was first proposed *that the members agree* that they would all make an extra charge whenever cement was held for the purchaser in the bins; and to meet the objection that such action was outside the province of the Constitution, a motion was carried to require the members to report whether or not they were charging for the use of bins. Every member understood what that meant. *And how does it tend to prevent frauds being perpetrated upon the companies for them to report whether they are exacting a bin charge or not?*

COST ACCOUNTING.

This subject was discussed at the meeting of July 17, 1916; and the following remarks by Mr. Israel (Coplay) are quoted because they show the close relationship between the members:

Mr. Chairman, there are sixty-five or more cement manufacturing companies in the United States of America, and it is not at all surprising there should be a great diversity of view. Those sixty-five companies are scattered all over the United States, with the exception of those represented around this table today. *We are in close*

touch with each other and we can agree upon something in less than a month. We have done things as important as this and we can do this. There is nothing about arriving at a system and method and formula for determining your costs that is so mysterious or so difficult that you need to be afraid to undertake it. If it were not so important I would not be urging it, but it is very important. I am backed up in my opinion by Mr. Hurley, the Chairman of the Federal Trade Commission, and I think we are all willing to concede he knows what he is talking about. He mentioned it as a most important thing, and we have not touched it.

We are here for the purpose of giving information to each other, and here is the most important matter of all. We say "Well, we don't act on this because the National Cement Association hasn't acted." *We have done many things every year where there was a great diversity of view; there isn't that difference here.* We can agree on things we have a right to agree upon. We have a right to agree upon a proper formula for determining cost and to go at the thing and do it *just like we have done other things here, and before you can say "Jack Robinson" it will be done.* (Vol. I, p. 498).

From the foregoing quotations taken from the Association's minutes it is seen that there was hardly a phase of the entire cement industry that was not considered in the meetings, and upon many of the most important matters an understanding

as to what practice would be pursued by the companies was reached. With representatives of defendants meeting from month to month, revealing to each freely and frankly their practices, exchanging views as to the virtue of the respective practices when there was any difference, and often formally agreeing upon a particular practice, *could there be anything but uniformity in all the customs of the trade, and was there a shadow of a chance for any real competition to exist among them?*

XI

NO SUBSTANTIAL COMPETITION AMONG MEMBERS OF THE ASSOCIATION IN PRICES AND TRADE PRACTICES

A number of witnesses connected with the cement industry testified with reference to the practical uniformity as to prices and the important trade practices; and to avoid the necessity of referring to the record a succinct statement of the material parts of their testimony will be given:

LUTHER KELLER, a dealer of Scranton, Pennsylvania. He has sold cement for the Atlas, Saylor's (Coplay), Giant, Vulcanite, Edison, Phoenix, Bath and Nazareth. Handles specific job contracts, in some of which the cement passes through his yard and in others is delivered direct. He said:

Since 1916 prices have been practically uniform. I don't know of any variation that has occurred in recent years; prices have been the same; that is, the quotations have been the same—and the prices. The discounts are the same—ten cents a barrel if paid within ten days from date of invoice. It is the same rule by all the companies. In regard to acceptance, I think generally I am given fifteen days to accept a quotation but that is frequently extended. Some companies have been a little more generous than others in that respect. There is no

difference in the contracts that I am required to make by the several companies as to the terms and price. I don't know how those contracts read, really, but as to terms of payment, there is no difference. In regard to the allowances for returned bags, the bags are returned freight prepaid and the count and inspection at the factory is to be accepted. The amount allowed for bags returned by the several companies is ten cents—generally the same. With reference to bin tests, there is one brand of cement that we handle that we generally pay six cents a barrel more, for what is known as the autoclave test. That brand is Nazareth.

(Vol. I, pp. 172-173.)

EURE L. MERRIMAN, a dealer of Scranton, Pennsylvania, has handled cement for thirty years. He said:

I have been handling seven brands in the last six years, Alpha, Dexter, Allentown, Lehigh, Edison, Penn-Allen, Giant and Pennsylvania. The prices which they have quoted me have been practically uniform. When one would change usually in two or three days we would get the changes from the others.

The terms of discount are 10 cents a barrel, dealer's discount in 10 days. There is no difference as to that between the different companies.

We are allowed a credit for bags at the price they are charged. There is not usually any difference in price allowed by the several

companies. There have been times when some of the cement companies did not advance their price on bags when the others did. The Whitehall Company I think did not advance the price on bags. It is not one of the defendants in this case.

I buy my cement f. o. b destination. I usually am allowed 15 days to accept the quotation by all the manufacturers. They extend, however, on request, a further period where you quote on contracts. When there is a change of price I am never notified of it in advance. The terms of the contracts I make with these several companies are practically the same.

A blanket contract as I interpret it is a contract that provides for a certain amount of cement to be taken in a specified time, but to be used where you choose to place it. There was a time when I could get a blanket contract. That is several years ago. I can't get a blanket contract from any company. They have cut out that practice of giving blanket contracts in the neighborhood of fifteen years ago. They have not been allowing it since that time. (Vol. I, p. 176.)

BERT H. HANBY, a dealer of Batavia, New York, has handled cement about fifteen years. Highest 20,000 barrels a year. Always handled Alpha, and have been handling Atlas about two years. During that time the prices quoted by the two companies have been uniform. Allowed ten cents a barrel discount for cash within ten days, usually given fifteen days to accept a quotation. Contracts with the

two companies are about the same. Both allow ten cents credit for return of bags. Has been quoted cement by other companies besides these two and doesn't think there has been any difference in prices quoted. If the cement is bought under contract they have to specify where it is going and what it is going to be used for. (Vol. I, pp. 177-178.)

EDWARD M. RODROCK, a dealer of Paterson, New Jersey.

For the last six or eight years there has not been any difference in the price of cement that has been quoted to us by the several companies at the same time. Salesmen of these various companies call to see me very often. I have not had periodical quotations from the cement companies whom we have not been representing. Salesmen from the other companies, nearly all of whom I know, come in and make quotations. There has not been any difference in the prices quoted to me by the salesmen of the companies.

The discount I am allowed is 10 cents a barrel for cash in ten days from date of invoice. There is no difference in that custom between the several companies. There is no difference so far as prices and terms of payment and discount are concerned between the specific job contracts of the several companies.

The allowance for bags returned at the present time is 10 cents each. There has not been any difference between the allowance from the several companies.

So far as I am concerned it makes no difference from which one of the companies I buy cement. There has never been one of them that has offered me cement on better terms. Now and then we buy cement from the several companies because we have customers demanding that particular brand of cement. One customer will like one brand and another customer another. (Vol. I, p. 179.)

ALLEN P. LOCKWOOD, a dealer of Buffalo, New York, engaged in the retail builders' supply business. From April, 1917 to July, 1920, was salesman for the Hercules Cement Company. Since then has been selling principally for the Lehigh, but also Penn-Allen, Knickerbocker, Alpha, and a little Atlas. The prices quoted him at any one time since July, 1920 have not been any different. He was salesman for the Hercules and did not have any authority to change the price of cement. He figured the price "by taking the mill base plus the freight rate to Buffalo, or wherever the point may be, adding bags. I would ascertain the freight rate by a freight rate book I had." (Vol. I, p. 183.)

The Hercules was a new company. I went with them in April, 1917. They put their cement on the market in June or July, 1917. We were underselling the other fellows a little bit. I think we did that throughout all of 1917 and maybe the early part of 1918. After that I often suspected there was a difference between the prices of the Hercules

cement and the other cement, but Hercules was the same price as you would consider the market price of cement after that time. I have not handled Hercules since I have been a dealer.

Since I have been a dealer the quotations have been the same with all of them. There has not been any difference with reference to trade discount or cash discount. The terms are 10 cents a barrel cash discount in 10 days, 30 days net. The prices for returned bags have been changed once or twice, and I think they all changed about the same time. The specific job contracts as to terms of sale and the discount, and so forth, are practically the same. The wording might be a little different. The substance is the same so far as I know. (Vol. I, p. 183.)

HARRY GILBERT engaged in selling builders' supplies in Germantown, Pennsylvania. Last six or eight years has handled six or eight different brands, Nazareth, Edison, Pennsylvania, Vulcanite, Universal and Atlas. The last three years has handled principally Lehigh and Bath.

There has not been any variation in the prices that those two companies have offered me during the three years. The price was usually the same when I was handling the other brands of cement. There was one time when some of them offered it cheaper than the others. I think it was about 1915. I was then offered cement at different prices. Since that time the quotations have all been the same. The discounts have been 10 cents

a barrel, 10 days. There was no variance in that respect between the companies. The credit allowance for returned bags had been the same. I was allowed fifteen days to accept quotations by all of them. It does not make any difference to me or my patrons from which company I buy so far as price is concerned. I have never purchased in less quantity than carload lots. There is no difference so far as terms of payment and prices are concerned in the specific job contracts of the several companies. (Vol. I, pp. 185-186.)

JOSEPH H. CLARK, dealer in builders' supplies in Philadelphia for about six years. He handled Vulcanite for first two years and since then principally Lehigh and Atlas.

There has been uniformity of price at the same time between the companies. Quotations made by the Atlas and the Lehigh Companies at the same time were the same. The Atlas Company allowed 10 cents a barrel for cash within ten days; the Lehigh the same.

As to the allowance for bags returned, the companies at different times allowed different prices, just according to what the charge had been. There was no difference between the two companies as to credits for returned bags at any particular time. The time allowed for accepting the quotation was the same with the two companies. The specific job contract forms as to prices and terms of payment were the same. When I handled Vulcanite its prices did not vary from the

others, nor its discounts, nor allowances for returned bags. I am allowed 10 cents a barrel differential on specific job contracts, and that is the same with all the companies I represented. (Vol. I, p. 187.)

JOHN H. KELTER has been for twenty-five years selling builders' supplies in Philadelphia. Has been selling for Penn-Allen, Bath, Lehigh and Co-play for the last fifteen years and has also sold Atlas, Alpha and some Phoenix.

We get a notice from one company or some company of a change in price, and three or four days afterwards the rest of the companies send us a notice meeting that price, whether it is a rise or a fall in the market. From that time up to another change there is no difference in their prices.

In regard to cash discounts, there is no difference, 10 cents a barrel in ten days from date of shipment. With reference to acceptance of quotations, their custom is fifteen days to accept, without we request longer.

Other companies occasionally send quotations to me. Other companies send their salesmen to me.

There is no difference in the amount that each will allow for returned bags. There is a change from time to time in the price. All bags are marked by the different companies they belong to with the returned price, 10, 15 or 25 on each bag, and the company's brand on the bag. (Vol. I, p. 189.)

ALFRED L. LYTH has been selling builders' supplies in Buffalo, New York, for eighteen or twenty years. Has been handling Lehigh for seventeen years, and Giant, Knickerbocker and Hercules for three or four years. While he has been handling those brands, the prices quoted by all the companies have been uniform. Salesmen from other companies came to him trying to sell cement. There was no difference in the price at which they offered to sell cement and the price which he was paying. The prices were lower in 1913, 1914, and 1915. They were all the same at about the same time. There has been no difference in the requirements of the companies as to cash discount or in their allowance for returned bags or with reference to the time within which an acceptance is required. Taken at the same time, the terms and prices offered at which cement has been sold to him have been the same. (Vol. I, p. 191.)

HUGH NAWN, a contractor of Boston, Massachusetts: His firm uses from 25,000 to 150,000 barrels of cement in a year. In 1919 they had a contract for the Gilboa Dam in the Catskill Mountains, and contracted for cement with the Whitehall (not a member) and Nazareth Companies. His contract with the Whitehall Company was at \$2.83 a barrel, and with the Nazareth at \$3.06. He received quotations from three or four other companies, one of which was the Atlas, and they all quoted at \$3.06. They from time to time receive quotations for cement, and the prices are usually the same, the in-

stance mentioned being the only one when the price was different. As he remembers, the discounts are the same; also the prices for bags, although they might fluctuate from time to time. (Vol. I, pp. 217-218.)

WILLIAM F. FELTON, a general contractor of Buffalo, New York: He purchases cement through dealers, but occasionally gets quotations from the manufacturers; and salesmen call on him. The prices quoted by the manufacturers and their agents and dealers have been the same. He has endeavored lately to buy cement from three or four manufacturers, but found no difference in prices or in the terms of discount, or price for the return of bags. The only reason he buys from one rather than another is that he may prefer one party over another. He filed quotations from the Giant, Coplay, Lehigh, Vulcanite and Whitehall Companies, all of which were the same except the Whitehall. After deducting for sacks that Company's bid was 10 cents higher than the others. (Vol. I, pp. 219, 220. See Gov. Exs. Nos. 256-260, vol. II, p. 670. Side pp. 1366-1370.)

WALTER P. WRIGHT, a builder of Richmond, Virginia: This concern buys through dealers but receives bids from cement manufacturers and their sales agents, and also inquires of them and dealers about the price of cement. At the same time, there is no difference between prices quoted them by the various manufacturers. That has been so since

1914. The discount offered is also the same, as is the price allowed for bags returned. (Vol. I, p. 220.)

THOMAS HANRAHAN, a building contractor of Schenectady, New York: He has received most of his quotations from dealers, but on different occasions has received quotations from manufacturers and their salesmen. They have been practically the same with the exception of one occasion, where the Lehigh quoted 5 cents less. That was in 1919, and the difference related to something about the freight rate, but he didn't know what it was. He has no recollection of any difference in prices quoted by manufacturers, with that one exception. There is no difference in the rate of discount or in credit for sacks. (Vol. I, p. 220.)

WILLIAM WHITE, in the sub-contracting business in Philadelphia: He buys cement mostly from the manufacturers; and they quote him direct, and also send their sales agents to him. "There isn't any difference between the quotations to me at the same time for the same job by these various manufacturers. There is no difference as to discount or as to the price of returned bags. That has been so since I have been doing business." (Since 1915.) (Vol. I, p. 221.)

JOHN O'CONNELL, Treasurer and Purchasing Agent of the Harrisburg Railways Company, Harrisburg, Pennsylvania: Has been purchasing cement for about fifteen years. Possibly 4 or 5 manu-

facturers have been quoting him. His experience has been that there has not been any difference in price with those he has been dealing with, principally the Vulcanite, Atlas and Lehigh Companies. His recollection is that the price of returned bags has been the same. (Vol. I, p. 222.)

CLYDE C. OAKLEY, building contractor, Newark, New Jersey: Has received quotations from Alpha, Atlas, Lawrence, Lehigh, in fact, most of the cement companies. He has found no difference in prices since back around 1914. The discounts are the same, as is the price of returned bags. (Vol. I, p. 222.)

GEORGE W. KRIEGER, JR., contractor, Poughkeepsie, New York: Since 1916, has received quotations from manufacturers and dealers. Manufacturers send their agents to him. Prices quoted by the manufacturers at the same time have been the same; and the rate of discount and the amount allowed for return of bags have also been the same. (Vol. I, pp. 222-223.)

LESTER C. NESBIT, for four years auditor and purchasing agent for G. W. Ensign Company, Contractors, Harrisburg, Pennsylvania: In most cases they buy direct from the manufacturers. The manufacturers quote them direct, and they also see their sales agents. The price given by the manufacturers is the same, as he remembers, as are also the discounts and price for returned bags. (Vol. I, p. 223.)

On cross- and re-direct examination he cites one or two instances when there was a cut in price by the Bath, and also by the Security. Bath gave a lower rate of about 16 cents in November last (1921) after this petition was filed. The cement was billed to him through a dealer, and "*We were asked to keep that a secret.*" (Vol. I, p. 224.)

JOHN L. SHADE, purchasing agent, Viscose Company, manufacturers of artificial silk, Philadelphia, and was previously assistant purchasing agent for the Philadelphia Electric Company: For the past four or five years he has bought about half a million barrels of cement. He received quotations from possibly ten different companies. There has been no difference in the quoted price at the same time. Discounts were uniform, and the price of returned bags were the same. He also related an incident, which has been heretofore referred to, about endeavoring to buy cement for use at Roanoke. The Lehigh would make no difference in the price of its cement delivered from Fordwick, a point nearby, and that delivered from the Lehigh Valley. (Vol. I, pp. 224-225.)

A. LEE GROVER, secretary and chief clerk of the State Highway Commission of New Jersey: In 1919 the Commission wrote various manufacturers of cement east of the Mississippi River for prices of cement f. o. b. plant. (Vol. I, pp. 225, 226.)

It received replies from about twenty companies, including a number of the defendant companies;

and replies from thirteen of the defendants were filed as Exs. 324-337. (See vol. I, pp. 673-684.) These replies are exceedingly interesting, viz:

The Allentown Company stated:

We note you ask for price f. o. b. the plant, but our policy has always been to make a delivered price in order that we can compete with other cement manufacturers. (Gov. Ex. 324, Vol. II, p. 673.)

The Alpha Company stated:

Our past experience has shown very conclusively that dealers and consumers of cement are not interested in our f. o. b. mill. They require in practically all cases a price delivered at destination. In view of this general demand on the part of our trade we have put in the policy of quoting prices delivered on cars at destination. There are other reasons why a mill price is not practical. As all, or at least a very great portion, of our cement must of necessity be distributed through dealers, and if we were to quote mill prices it might easily interfere with the established custom of dealers distribution. *If we quote mill prices, then the cement becomes the property of the purchaser at our mill and could be shipped to any point designated by him and we would have no further control over the shipment.* You will readily see that this would conflict with the present method of distributing cement through dealers. (Gov. Ex. 325, Vol. II, p. 674.)

The Atlas Company stated:

Our prices are quoted f. o. b. cars destination based on \$3.00 per barrel at our plant at Northampton, Pa., plus freight. (Gov. Ex. 327, Vol. II, p. 675.)

The Coplay Company stated:

It is difficult for us to give you a price f. o. b. plant, without knowing the destination where the cement will be used. (Gov. Ex. 328, Vol. II, p. 676.)

The Dexter Company stated:

* * * it is not our policy to quote prices or sell our cement f. o. b. our plant at Nazareth, Pa. Our quotations are made on a delivered price basis f. o. b. destination. (Gov. Ex. 329, Vol. II, p. 677.)

The Edison Company quoted a price f. o. b. its mills at New Village, N. J. (Gov. Ex. 330, Vol. II, p. 680, side p. 1394.)

The Giant Company, after first making inquiry as to the "point of delivery" and being advised that the Commission desired a price f. o. b. mill, stated:

* * * we have always found that to name other than a delivered price means endless confusion to our friends, as they are then obliged to secure freight rates to different points to show the actual cost to them. Another reason that we refuse to quote other than a delivered price is that the policy of this company has been not to quote a dealer for delivery outside of his own town,

and therefore if we named a mill price to our dealer we felt that he could order the cement diverted while in transit if it was billed to him at a mill price, while by billing it direct to a given point it could not be done under our quotation. (Gov. Ex. 331, Vol. II, pp. 680-681.)

The Knickerbocker Company stated:

* * * we are unable to quote you prices which would be attractive as the freight rates from our mill, which is located at Hudson, N. Y., to points in New Jersey are so high that we cannot meet the competition there and secure sufficient revenue to show us a profit on our product. (Gov. Ex. 332, Vol. II, p. 681.)

The Lawrence Company quoted a price f. o. b. its mill. (Gov. Ex. 333, Vol. II, p. 682.)

The Lehigh Company stated:

* * * our practice is to quote all prices f. o. b. point of destination at which the material is to be used. (Gov. Ex. 334, Vol. II, p. 682.)

The Penn-Allen Company stated:

We do not quote mill prices but make all quotations f. o. b. destination. (Gov. Ex. 335, Vol. II, p. 683.)

The Phoenix Company stated:

It is not our custom to quote prices on Phoenix Portland Cement f. o. b. mill, but rather to quote prices delivered at destination. For your information, however, you

are advised that our present mill basis is \$3.00 per barrel including the bags. Our quotations are made invariably, however, f. o. b. destination, and our present price at Trenton is \$3.37 per barrel. (Gov. Ex. 336, Vol. II, p. 684.)

The Vulcanite Company stated:

* * * it is against the policy of this company to name prices f. o. b. our plant. This we have consistently declined to do for the United States Government, railroads under government control, contractors doing Government work or railroad work, or anyone else. (Gov. Ex. 337, Vol. II, p. 684.)

In response to a circular letter dated March 15, 1921, requesting bids on 2,625 barrels of cement for use at Rahway, New Jersey, the Commission received quotations from the Edison, Vulcanite, Pennsylvania, Alpha, and Atlas companies, and from George M. Friese, a dealer at Rahway. (Gov. Exs. 339-344, Vol. II, pp. 685-688 and side pp. 1406½-1409 and 1414-1415.) These quotations ranged from \$3.48 per barrel quoted by the Edison Company, to \$3.63 per barrel quoted by the Atlas and Vulcanite companies. In connection with the different quotations submitted by these companies indicating competition, it is deemed proper to point out that the five cement manufacturing companies which submitted prices had been indicted on March 1, 1921, for violation of the Sherman Anti-Trust Act.

THOMAS S. SULLIVAN, chairman, Boston, Transit Commission, and since July, 1918, a member of the Commission: In 1916 he received bids from Allentown, Lehigh, Alpha, Coplay and Atlas Companies. Every company quoted \$1.87 per barrel of four bags, and each company offered to allow 10 cents a bag for each bag returned, with freight prepaid to mill, and also a discount of 5 cents per barrel for payment within ten days. (Vol. I, p. 229, Gov. Ex. 348-352, vol. II, pp. 689-697.)

HOWARD E. CHURCH, supervisor of purchasing for Fred T. Ley Company, General Contractors, New York City: They buy through dealers, but have tried to buy from manufacturers. Outside the metropolitan district they usually purchase through their own cement supply company, located at Springfield, Massachusetts. He also inquires of cement salesmen how the market is. Prices of the several cement manufacturers at the same time are usually the same. (Vol. I, pp. 230-231.)

FRANK B. TALLEY, purchasing agent for the Foundation Company, New York City: They buy through dealers. Has talked with representatives of the Atlas, Vulcanite, Lehigh, Pennsylvania, Giant, probably one or two others. In making their prices, there has been no difference in their dock price at the same time, or in the price of returned bags. For jobs outside the city, in two or three instances, the Whitehall Company (not a member) quoted them lower prices. (Vol. I, pp. 232-233.)

RUDOLPH MEYER, purchasing agent for Thompson-Starrett Company, New York City: Buys exclusively through dealers, but "We always wrote the manufacturers and the dealers in connection with every decent size job, any large jobs we had. The manufacturers sent us quotations on the letter-heads. I don't think their prices were cheaper than the dealers' prices. *We were not able to buy directly from the manufacturers.* I talked with the salesmen of various manufacturers, Pennsylvania, Atlas, Hercules, Alpha. I asked them at different times whether they would sell direct and they said 'No.' I don't know as there was any particular reason given." (Vol. I, pp. 233, 234.)

SOLOMON HOLZER: Was in the export business and bought mostly from the Edison and Coplay companies. Got prices from other companies. There was no difference in the prices offered at the same time. The discount was always 5 cents a barrel for cash. (Vol. I, p. 234.)

EDWARD A. KEELER, building contractor connected with the Peter Keeler Building Company, Albany, New York: Up to three or four years ago would send circular letters to possibly half a dozen selected dealers of cement companies and received quotations from Glens Falls, Helderberg, Knickerbocker, Edison, Atlas and Alsen's; and he does not recall any difference in the quotations up to three or four years ago, or in the price of returned bags or discounts allowed. For the last three or four years has been calling up over the 'phone or writing

for prices; *recently* there have been some slight differences in prices delivered to the operation, but no difference in prices delivered f. o. b. cars. He remembers one instance in the fall of 1919 when the prices quoted were the same f. o. b. Troy, but there was a little difference in the price f. o. b. at the building. The maximum difference was about 5 cents. He also cites an instance or two where he induced the company to guarantee against an increase in freight rates. (Vol. I, pp. 240-241.)

From the testimony of the witnesses representing the contractors and builders of New York City, there undoubtedly was an understanding between the manufacturers that cement to be delivered within the metropolitan district of New York would be sold only through dealers.

WALTER LEWIS, a Government accountant, testified that he had prepared a statement based on Form 10, which is the printed list issued quarterly of the contracts reported to the members on the daily sheets, and shows every specific job contract in force at the time of its publication. He used the reports for the years 1919 and 1920, and up to March, 1921, and checked a total of 928 transactions which were selected at random. Those transactions reported shipments to 591 towns in various states. He deducted from the delivered price the freight specified in the rate books and also the bag price applying at the time the contract was made, and thus arrived at the mill base prices at Lehigh Valley, Universal, Hudson and

Fordwick. More than 95 per cent of the prices thus ascertained corresponded with the mill base prices existing when the transactions were had. Of the remaining 5 per cent, there were some transactions which apparently were based on a mill price or a bag price existing just before or shortly after the transaction; and a number of variations occurred in the latter part of 1920 and the first three months of 1921. (Vol I, pp. 250-251.) During that time not only was an investigation being made by the Government, but the Lockwood Committee had the cement industry, along with many other industries, under investigation. (Minutes, November 18, 1920; vol. I, p. 614.)

XII

DEFENSES

Defendants' brief was received too late to permit of an extended reply thereto; but it is believed that the facts heretofore detailed constitute a complete refutation of every proposition relied upon in defense. Mr. Morron was the only representative of the defendant corporations who testified. Evidence of the following character was offered on behalf of the defendants: (1) A vast amount of correspondence was read, most of which was between officers and agents of the several defendant corporations, the object being to show that each company was actively prosecuting its business. As heretofore stated, it is not insisted that there was no competition in selling cement. Each company undoubtedly was making an earnest effort to push its business; *but there was no competition so far as prices and important trade practices were concerned; and, therefore, as all cement is of the same quality, the public was deprived of all competition that was materially valuable.* (2) The Government introduced a number of tables prepared by its accountant, James W. Allen, which showed the relative production and shipments of cement by the several defendants; and numerous charts prepared by defendants based upon those tables were introduced to show that the relationship between the

quantities produced and shipped by the several defendants had not been constant. This is immaterial because, as above stated, it is not claimed that defendants were not active in selling cement. However, it is a rather significant circumstance that the production and shipments of the three large companies, Atlas, Alpha, and Lehigh, were constantly in the neighborhood of 50 per cent. of the entire amount reported to the Association. (3) A number of expert witnesses of high standing were examined to prove that uniformity of price of a commodity is no evidence whatever of a combination or agreement between those engaged in producing the commodity, and that the price of cement would necessarily be uniform in the absence of all agreements and combinations upon the part of the manufacturers. Probably the most distinguished economist examined upon this subject was Dr. Thomas Sewall Adams, Professor of Economy at Yale University. The character of his testimony appears from the following colloquy between him and the court:

The COURT. Do you mean to say that you think from an economic standpoint no fair inference can be drawn either way from the mere fact of uniformity in prices?

The WITNESS. From the mere prices, your Honor, I do not think any inference can be drawn. You can go back into the circumstances of the industry to determine it.

Q. Let us see about that, doctor. Suppose you know of a number of manufacturers in

a certain industry whose cost of production is different, substantially different, and who have the capacity to overproduce. If they were all running to full capacity there would be a very considerable overproduction, and suppose there is absolute uniformity running for some years through their prices, uniformity in every respect, do you mean to say that does not mean anything at all?

A. I think you forget in your inference the fact that the increasing production in many lines usually means higher costs. That is not an absolutely uniform but a very frequent fact. I should say it is very often the fact. For a given period of time if you increase your production you may be able to reduce your costs, but the point is reached where if you push your production past a certain point, you increase them.

Q. Take a number of manufacturers in the same industry, manufacturing 90 per cent or more of that particular product, their cost of production is very substantially different.

A. All of them together manufacturing 90 per cent?

Q. That is what I mean. They have a capacity to produce a great deal more.

A. At what cost, sir?

Q. I don't care anything about the cost now.

A. All right.

Q. I say the difference in cost of production by these factories is substantial, and they

have the capacity to produce a great deal more than is consumed, and yet suppose their quotations or prices and the prices at which they will sell their products, are exactly the same extending over some years, that their rate of discount is exactly the same, that the price on returned bags is exactly the same, everything is uniform, do you mean to say that does not mean anything?

A. I think it may mean anything. It may mean the most perfect competition. As I see the situation, competition is a game, a race, and races frequently result in dead heats, and the competition is active when they are doing that.

Q. What kind of competition?

A. Competition to get ahead of your competitors.

(Vol. I, pp. 305-306.)

Undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers, but to say that uniformity under the circumstances described by the court means nothing can hardly be accepted by any one not an economist. While economic laws tend to produce uniformity of price under normal circumstances, yet the price thus established is entirely different from a uniform price established by an agreement or through a combination. The one will be controlled entirely by the law of supply and demand; and when the demand does not exceed the supply the price will be

in the neighborhood of the cost of production to those producing most cheaply, plus a reasonable profit. But the price resulting from agreement or combination is entirely artificial. If determined by agreement, it is, of course, the price specified. But if it results from a combination of the character here shown, it is established by human motives and impulses entirely different from those which prompt the actions of genuine competitors. Under such circumstances each member either refuses to cut under the prices of his fellow members, to whom he is constantly reporting, or, through a spirit of rivalry, endeavors to get a higher price. Consequently, if Dr. Adams' theory that uniformity is no evidence of a combination be true, the testimony is of no value in this case; because the existence of the combination and its nature and activities are fully proven without any contradiction; and it necessarily results that the prices charged by defendants and the uniformity of prices and of trade practices proven were the results of this combination.

DISCUSSION OF THE LAW.

Before reviewing the few authorities which have a direct bearing upon the facts of this case, it is well to succinctly restate the scope of and the elements that compose the combination between the defendants.

The ultimate object of the organization was to control the price of cement. This was to be accomplished in two ways: (1) By the control of the supply of cement on the market, and (2) by intimate association, exchange of information, and a ready means of computing a common delivered price at any point. The agencies through which free cement was to be kept from the market were, (1) specific job contracts, (2) checkers and (3) cancellation of all but one contract for the same job and of all excess cement called for in any one contract. The record does not disclose that the use of the specific job contract was formally agreed upon by all the companies; but it does show that it was in existence when the Association was organized and has continued to be used by all of them ever since, and that this part of the scheme is built around this form of contract.

These specific job contracts are most ingeniously drawn. Those made with the user of cement, oblige him to take all the cement used in the job. If he were to make a dozen contracts for the same job,

they would all be good *as to him*; but they are so worded that the seller is not bound to deliver any cement that is not actually used in the job described. Likewise, all contracts made with a dealer are valid *as to him* provided that dealer furnishes the cement for the job described, but are not binding on any seller other than the one whose cement is actually used. But, if a contractor does not take from a dealer the cement he uses in the job, the contract is not binding on either the seller or the dealer. So the only contracts which the manufacturers have any legitimate excuse for cancelling are those made with dealers through whom the cement used is not purchased. All other contracts are enforceable by the manufacturers. *But they are so worded that the manufacturers do not have to deliver any cement under them except that actually used.* The breach of the contract consists in not using the cement contracted for on the job; and therefore the seller is not bound to offer the cement when the buyer has made it impossible to use it according to contract. *However, it is clearly recognized in the contract that the seller may deliver, at his option, cement not used on the job described.* It says, "The seller is not obligated to furnish" more than the quantity of cement actually used in the work. Then it is unquestioned that the defendant manufacturers have entered into this combination: They agreed among themselves that they would not deliver any cement under specific job contracts other than that actually used in the

jobs described, and would thereby withhold from the general trade all cement that would otherwise reach it through those contracts. And to enforce this agreement they have further conspired and agreed that they would, through the Association, exchange a full description of every specific job contract to enable them to check up each job and ascertain whether more than one contract existed therefor, and that they would also employ checkers to examine every job that might be questioned to ascertain whether more cement had been contracted for than was necessary for use in said job; and the combination has been carried out with a thoroughness that at times could well be called ruthlessness.

This record shows that hardly a sack of cement has passed through the net thus set; and where it was suspected that a bag was loose, it was hunted with as much perseverance as smuggled goods are hunted by a revenue officer. By this combination defendants have continually kept from the market a quantity of cement which they well knew, and by their conduct recognized, would be sufficient to materially affect the prices. If this were the sole question in this litigation, can there be a doubt under the authorities that such a combination and conspiracy is within the prohibition of the Anti-Trust Act? But this is but a part of the combination. They have agreed to, and do, exchange complete information with reference to each individual's production of clinker, and production and shipments

of cement, to enable them to curtail production if it be thought advisable; also to, and they do, include in their reports of sales the exact prices at which every sale for a specific job is made, knowing that there is a uniform differential between the price to dealers and to consumers; also to, and they do, distribute freight rate books showing the estimated freight rate from *agreed basing points* to every station in the territory covered by the Association, so that by a glance at these books each member can tell the exact price which every other member will bid for the sale of cement to be delivered at any one of those points. They also have agreed to, and do, hold meetings at which they discuss all important trade practices in the industry, and at times reach an agreement as to some of them. The result of this combination has been practical uniformity in the price of cement and in the terms of its sale throughout the entire section in which defendants operate; and *competition as to prices and terms in such territory has been eliminated*. It is not contended that all competition of every character has been suppressed, but that it has been reduced to competition in service and in the personality of the salesmen. Is such a gigantic combination and conspiracy which completely dominates a great industry in the most populous and wealthy section of the United States violative of the Anti-Trust Act?

The Government relies in this case upon the same authorities as those relied upon in cause No. 342,

known as the *Maple Flooring Case*; but to avoid reference to the brief filed by the Government therein the review of the authorities in that case will be reprinted here with such changes in wording as are necessary to make it applicable to the facts of this case.

It is believed that no principles of law can be better settled than are those which control the questions involved in this case; and that to refuse to apply them to the facts proven in this record would be in effect to overrule the previous decisions of this court, and to license trade associations to engage in every practice which they may pretend is adopted as a reasonable regulation to promote the general welfare of business, regardless of how it may effect production and prices, and how oppressive it may be upon the public. The cases which have a direct bearing upon the activities of associations are comparatively few in number, and will now be given consideration.

Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, may be considered as the leading case in applying the Anti-trust Act to practices of trade associations. The association attacked was composed of retail lumber dealers; and the practice passed upon by the court was that of distributing among the members a list of manufacturers who dealt directly with consumers. The following was the form of the report distributed:

OFFICIAL REPORT

(Name of the particular association circulating it.) Statement to members (with the date)

You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers)

Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin.

The facts relative to the preparation and distribution of this list and the inferences to be drawn therefrom are thus stated by the court:

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

"The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without proper foundation or should the secretary become satisfied that the matter is a trifling one or the result of inadvertence, the incident usually terminates at this point; but should the complaint appear to be serious and well founded the case is submitted to the board of directors of the retail association at its next meeting and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends

the name to Mr. Crary, of New York, who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associations; those for each association being marked with its name and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When

viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed this purpose is practically conceded in the brief of the learned counsel for the appellants:

“It was and is conceded by defendants and the Court below found that the circulation of this information would have a natural tendency to cause retailers receiving

these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them."

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed. (234 U. S. 607-609.)

In reply to the contention that no agreement between the defendants was proven, the Court said:

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred. (p. 612).

The pressure thus brought to bear upon the manufacturer, which induced him to trade through retailers and not directly to the public was not the only restraint deemed material by the court.

With reference to the moral effect upon the retailers themselves who received the lists the court said:

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the District Court, *but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations.* In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor, supra.* (pp. 612-613).

In answer to the contention that what was done was for the protection of the retail trade, the court said:

The argument that the course pursued is necessary to the protection of the retail trade

and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242 (p. 613).

The court concluded its opinion thus:

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding (p. 614).

The principles there decided are directly applicable to and in fact control this case, but the practice there condemned was simple and innocuous in comparison with the scheme adopted and enforced by defendants. There the immediate purpose not was the control or increase of prices, though prices were no doubt incidentally affected by the practice. It was not claimed that the gen-

eral volume of business was reduced. The restraint consisted in diverting the trade from the path which it otherwise would have taken; or rather in forcing it to remain in its usual path. While the distribution of the list was made pursuant to an understanding between the members of the association, yet there was no agreement between them that they would give any consideration to the lists. The restraint resulted entirely from the moral effect the information distributed had upon the members. If one was "blind indeed who does not see the purpose in the predetermined and periodical circulation of this report" as said by the court in that case, he is unquestionably blind if he fails to see the purpose of the complicated scheme devised by the defendants in this case and the thoroughness with which it has been enforced.

American Column & Lumber Co. v. United States, 257 U. S. 377, was the first case in which an association was attacked because it engaged in what is known as "Open Price Competition." The opinion may be divided into four parts, to wit:

- (1) A statement of the plan;
- (2) The manner of its enforcement;
- (3) The results of its operation; and
- (4) Application of the law.

Beyond question what the court condemned was *the plan*; and the evidence showing the manner in which it was enforced and the results therefrom was cited and discussed only to show the purpose intended to be accomplished by the association and what was actually accomplished. In interpreting this decision, counsel for many associations, as was done by counsel for the defendant association,

have made the mistake of assuming that the case is not an authority unless the identical acts be committed in enforcing the association's plan that were shown to have been committed by the association attacked in that case; when in fact the precise character of the acts are unimportant, if the plan itself is of such nature that if enforced interstate commerce will be restrained thereby, and if the proof shows that the plan has been adopted and put in operation by the members of the association. An analysis of the opinion will show, not only that no element deemed essential in that case is wanting here, but that there are elements which did not there exist but are present here, that are specially vicious, and are within themselves violative of the Antitrust Act.

In beginning the discussion the court said:

The activities which we shall see were comprehended within the "Open Competition Plan," (which is sometimes called "The New Competition,") have come to be widely adopted in our country, and, as this is the first time their legality has been before this court for decision, some detail of statement with respect to them is necessary (p. 392).

The court then quotes at some length from the report of the committee which evolved the plan. In that report the committee discussed the objects of the plan and the benefits expected to be derived therefrom; *and as defendants in this case are operating the same open price plan that was there at-*

tacked and condemned, that report is as pertinent here as if made by a committee of the defendant association. With reference to that report and a subsequent explanation of the objects and purposes of the plan, the court in part said:

After stating that the purpose was not to restrict competition or to control prices but to "furnish information to enable each member to intelligently make prices and to intelligently govern his production," the committee continues:

"The chief concern of the buyer, as we all know, is to see that the price he pays is no higher than that of his competitors, against whom he must sell his product in the market. The chief concern of the seller is to get as much as anybody else for his lumber; in other words to get what is termed the top of the market for the quality he offers. By making prices known to each other they will gradually tend toward a standard *in harmony with market conditions*, a situation advantageous to both buyer and seller."

Not long after the consolidation a further explanation of the objects and purposes of the "Plan" was made in an appeal to members to join it, in which it is said:

"The theoretical proposition at the basis of the Open Competition plan is that,

"*Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.*

"The Open Competition plan is a central clearing house for information on prices, trade statistics, and practices. By keeping all members fully and quickly informed of what the others have done, the work of the plan results in *a certain uniformity of trade practice*. There is no agreement to follow the practice of others, *although members do naturally follow their most intelligent competitors*, if they know what these competitors have been actually doing.

"The monthly meetings held in various sections of the country each month have improved the *human relations* existing between the members before the organization of this plan." (Italies the court's p. 392.)

After quoting at length from a subsequent communication sent to the members in which the advantages of the plan were recited, the court then stated in detail the system of reporting, first by members to the association, and second by the association to the members; and without quoting, or giving a summary of the court's language it is sufficient to say that the system of reports there described and the system used by defendants in this case are in every material feature precisely the same. After a description of the reporting system the court said:

This extensive interchange of reports, supplemented as it was by monthly meetings at which an opportunity was afforded for

discussion "of all subjects of interest to the members," very certainly constituted an organization through which agreements, actual or implied, could readily be arrived at and maintained, if the members desired to make them (p. 397).

The court then said that in practice three important additions were made to the plan:

First: Instead of the monthly meetings provided for, the territory in which the association was operating was divided into four districts and forty-nine meetings were held. However the proof showed that the division was for the convenience of the members; and the members really attended a meeting but once a month.

Second: Before each meeting a questionnaire was sent out asking for reports on production for the preceding month and estimated production for the next two months, and whether it was expected that the mill would be shut down, and if so for how long; and also for the members' views as to market conditions. From the information thus received the statistician compiled a report which was distributed among the members attending the meeting.

Third: While the plan provided for a monthly market letter, Gadd, the manager of statistics, actually sent out letters of that nature with the weekly sales reports. It is unnecessary to again repeat the many features in this case that were not

present in that one, some of which are entirely outside the Association's constitution and by-laws.

After stating in detail the plan as adopted with the features added in practice the court said:

Obviously the organization of the defendants constitutes a combination and confessedly they are engaged in a large way in the transportation and sale of lumber in interstate commerce so that there remains for decision only the question whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this Antitrust statute.

It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful (pp. 399-400).

The court then, after quoting from a number of authorities in which the Antitrust Act had been construed, quotes at length from communications sent by Gadd to the members, and also from letters written by members to Gadd in response to a circular letter sent out by him asking for an expression of opinion as to benefits received from the

operation of the plan. And these quotations are followed with the remark:

These quotations are sufficient to show beyond discussion that the purpose of the organization and especially of the frequent meetings was to bring about a concerted effort to raise prices regardless of cost or merit, and so was unlawful, and that the members were soon entirely satisfied that the "Plan" was "carrying out the purpose for which it was intended" (p. 409).

Therefore the comments of Gadd and the statements of the members as to benefits derived from the plan was deemed important because *they showed the purpose of the organization.* And there is no justification whatever for the assumption that the identical evidence then introduced must appear in this record before that case can be considered a controlling authority in this one. As above shown the members of the defendant association met and discussed face to face every question relating to the industry; and no comments upon the part of a manager or secretary are necessary or would be even helpful. There is no probability that the Government will ever be able to introduce in another case the same evidence with reference to the results accomplished by the association, because no other manager will ever write the members asking testimonials as to its benefits. But to the same effect were the remarks of Mr. Lober when chosen

President at the meeting of January 15, 1917, to wit:

I feel that we have gone a long way in the last year. We have done a great deal. I only hope we can progress as much during 1917. (Vol. I, p. 522.)

And also the remarks of Mr. Ward, when assuming the office of President two years later, to wit:

I further want to say that I think we have brought this work up to *where it is about one of the best of its kind in existence. Any organization that can produce the results that this one has, at an annual expenditure of \$50,000, I think, is going some.* (Vol. I, p. 585.)

After a thorough review of the facts and the law the court said:

To call the activities of the defendants, as they are proved in this record, an "Open Competition Plan" of action is plainly a misleading misnomer.

Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a

"harmonized" estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. *To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a "new form of competition" and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn, as an old evil in a new dress and with a new name.*

The "Plan" is, essentially, simply an expansion of the gentlemen's agreement of former days, skillfully devised to evade the law. To call it open competition because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, can not conceal the fact that the fundamental pur-

pose of the "Plan" was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects, not upon fines and forfeitures as in earlier days, *but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties—cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together under the subtle direction of a single interpreter of their common purposes*, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do (pp. 410-411).

United States v. American Linseed Oil Company, 262 U. S. 371, involved the validity of an organization which functioned through a bureau. The manufacturers of linseed oil made separate but identical contracts with the bureau whereby they obligated themselves to furnish reports of their sales and prices to the bureau; and the bureau was to report the information to the other members. Monthly meetings were also provided for. The plan was operated through Mr. Armstrong, who called himself a bureau, instead of through an association conducted by a secretary as in the present case, or a manager as in the Hardwood case.

Naturally there is a variation in the plan as applied to different industries. The production of linseed oil is seasonal; and it is sold generally for future delivery months in advance. For the plan to work successfully in connection with that industry it was felt necessary that change of prices should be promptly reported. Every member was at perfect liberty, so the defendants all claimed, to change its price at any time and to any extent it might see fit; but if it offered oil to a prospective purchaser for less than its list price it immediately wired its offer to the bureau, which relayed it to the members. When it was suspected that a member had made a sale for less than its list price other members had the right to make inquiry of such member about the matter through the bureau. The evidence showed that the system as outlined in the contract was pretty rigidly enforced. The court after stating at length the provisions of the contracts and the manner in which they had been enforced said:

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies *and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.* “The statute did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all

normal methods, whether by agreement or otherwise, to accomplish such purpose.

* * * The words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.” *United States v. American Tobacco Co.*, 221 U. S. 106, 179, 180; *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501; *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463.

*Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it the Court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed. To decide otherwise would be wholly inconsistent with the conclusion reached in *American Column & Lumber Co. v. United States*, supra (pp. 388–389).*

And the court thus concluded its opinion:

We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or

agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.

The challenged plan is unlawful and an injunction should go against it as prayed by the original bill (p. 390).

In fact, as pointed out by the court in the Hardwood and Linseed Oil Cases, combinations in the form of associations engaging in practices of the nature heretofore described fall squarely within the prohibitions of the Antitrust Act as construed in many former cases.

While as said in *United States v. American Tobacco Co.*, 221 U. S. 179, in referring to the previous decision in the Standard Oil case, "the statute did not forbid nor restrain the power to make *normal and usual contracts* to further trade by resorting to all *normal* methods, whether by agreement or otherwise to accomplish such purpose," yet as declared in the same case (p. 181), "in view of the general language of the statute and the public

policy which it manifested, *there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.*"

The closing remarks of Circuit Judge (subsequently Mr. Justice) Lurton in the great opinion delivered in *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 46, is specially applicable in this case:

It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the Addyston Pipe Case with a strength to which we can add nothing.

THE RELIEF TO WHICH THE GOVERNMENT IS ENTITLED

The decree entered in the court below is the only one that can properly be made in this case.

The situation here presented is quite different from the conditions existing when the acquisition of various properties by a corporation, or the merger of a number of corporations into one, have been held to constitute a monopoly or an unlawful combination in violation of the Anti-Trust Act. There the rights of property are involved, and the court will not destroy the property, but direct that it be restored to the original owners, or be so divided that a further violation of the statute will not exist. But here no property rights are involved. There exists nothing but an agreement or combination which the defendants have entered into and in which they are engaging; and the status quo is restored and the restraints upon commerce are stopped by a simple decree declaring the agreement and combination unlawful, and inhibiting the defendants from further engaging therein, or in any combination of like character.

An unlawful conspiracy may be composed of elements each of which when considered alone is lawful. As said in *Swift v. United States*, 196 U. S. 375, 396:

The scheme *as a whole* seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough

to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme. *It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.*

To hold that the defendants should be enjoined only from doing those things which are within themselves unlawful would lead to the absurd result that where each element of a conspiracy is, when standing alone, lawful; no injunctive decree can be entered, although the conspiracy composed of these several elements may be unlawful and accomplish the most harmful results.

This question was conclusively settled in *American Column & Lumber Co. v. United States, supra.* There the court entered a sweeping decree declaring the association an unlawful combination and inhibiting the defendants from engaging in any of the activities provided for by its organization. On the hearing defendants' counsel earnestly insisted that the decree was too broad and that the court should specify certain things which the association could legitimately do. The court disregarded this insistence and affirmed the decree of the court below in *toto*. A petition for a rehearing

was filed, in which it was again urged upon the court that a limitation should be placed upon the decree and that the defendants should not be enjoined from separately doing a number of things prescribed by the association, but the petition was dismissed by the court.

In fact the question had been settled in the case of *Swift v. United States*, 196 U. S. 375, 401-2. A broad decree inhibiting the defendants from engaging in any of the things alleged in the bill had been entered by the court below, and it was insisted that the decree should be modified in certain particulars. The only modification directed by the court was that in one or two particulars it should be made more specific. But the court especially considered the allegations in the bill (the case had been disposed of on demurrer) wherein it was alleged that defendants had engaged in and would continue arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public (p. 392). The court stated that the acts here charged, apart from the combination and the intent, might perhaps not necessarily be unlawful except for the adjective which proclaimed them so, and the court assumed for the purpose of the decision that they were not unlawful, and that the defendants severally might lawfully obtain less

than the regular rates for transportation if the circumstances were not substantially similar to those for which the regular rates were fixed; but the Court said:

Whether this particular combination can be enjoined, as it is, apart from its connection with the other elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd v. Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away. (196 U. S. 401, 402.)

For the foregoing reasons it is respectfully submitted that the decree of the court below should be in all respects affirmed.

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